NEXT ANNUAL MEETING WILL BE HELD AT LOS ANGELES, JULY 16-19

AMERICAN BAR ASSOCIATION

JOVRNAL

VOL. XXI APRIL, 1935 NO. 4

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THE TRAVELERS

L. EDMUND ZACHER, *President*

HARTFORD  CONNECTICUT

Annual Statements *December 31, 1934*

THE TRAVELERS INSURANCE COMPANY

(*Seventy-first Annual Statement*)

ASSETS		RESERVES AND ALL OTHER LIABILITIES		
U. S. Government Bonds	$181,661,098.00	Life Insurance Reserves		$618,384,722.24
U. S. Govt. Gtd. Bonds	4,596,200.00	Accident and Health Insurance Reserves		9,248,310.74
Other Public Bonds	74,349,041.00	Workmen's Compensation and Liability Insurance Reserves		45,035,819.95
Railroad Bonds and Stocks	64,091,173.00	Reserves for Taxes		3,192,723.02
Public Utility Bonds and Stocks	60,357,596.00	Other Reserves and Liabilities		2,285,875.89
Other Bonds and Stocks	36,881,629.00	Special Reserves		8,846,861.59
First Mortgage Loans	78,234,156.72			
Real Estate—Home Office	12,386,943.61	Capital	$20,000,000.00	
Real Estate—Other	40,007,429.64	Surplus	17,004,960.80	
Loans on Company's policies	122,282,347.37			37,004,960.80
Cash on hand and in Banks	13,649,696.14			
Interest accrued	9,235,784.55			
Premiums due and deferred	25,656,635.80			
All Other Assets	609,543.40			
TOTAL	$723,999,274.23	TOTAL		$723,999,274.23

THE TRAVELERS INDEMNITY COMPANY

(*Twenty-ninth Annual Statement*)

ASSETS		RESERVES AND ALL OTHER LIABILITIES		
U. S. Government Bonds	$3,785,039.00	Unearned Premium and Claim Reserves		$7,790,017.25
Other Public Bonds	2,063,358.00	Reserves for Taxes		394,543.45
Railroad Bonds and Stocks	2,149,592.00	Other Reserves and Liabilities		549,307.52
Public Utility Bonds and Stocks	1,194,167.00	Special Reserves		4,994,783.26
Other Bonds and Stocks	9,279,509.00			
First Mortgage Loans	327,500.00	Capital	$3,000,000.00	
Cash on hand and in Banks	1,663,753.53	Surplus	5,567,108.88	
Premiums in Course of Collection	1,735,300.40			8,567,108.88
Interest accrued	97,541.43			
TOTAL	$22,295,760.36	TOTAL		$22,295,760.36

THE TRAVELERS FIRE INSURANCE COMPANY

(*Eleventh Annual Statement*)

ASSETS		RESERVES AND ALL OTHER LIABILITIES		
U. S. Government Bonds	$8,239,000.00	Unearned Premium and Claim Reserves		$11,413,927.90
Other Public Bonds	482,000.00	Reserves for Taxes		411,500.28
Railroad Bonds and Stocks	1,483,400.00	Other Reserves and Liabilities		105,800.34
Public Utility Bonds and Stocks	3,352,000.00	Special Reserves		1,983,045.01
Other Bonds and Stocks	1,609,100.00			
First Mortgage Loans	250,000.00	Capital	$2,000,000.00	
Cash on hand and in Banks	1,535,748.88	Surplus	2,558,842.87	
Premiums in Course of Collection	1,368,002.89			4,558,842.87
Interest accrued	139,696.13			
All Other Assets	14,168.50			
TOTAL	$18,473,116.40	TOTAL		$18,473,116.40

Additional information about The Travelers Companies, including complete lists of securities, is set forth in The Travelers Year Book for 1935. Copies will be supplied upon request.

ALL FORMS OF LIFE, CASUALTY AND FIRE INSURANCE AND ANNUITIES

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XXI APRIL, 1935 NO. 4

CVRRENT EVENTS

Death of Former President Charles A. Boston

CHARLES A. BOSTON, President of the American Bar Association, 1930-31, died on March 8 at his home in New York. His death was due to heart disease. Mr. Boston had been in failing health for several months and had only gone to his office once or twice since Christmas.

Immediately on receipt of the news of his death President Scott M. Loftin appointed the following committee to represent the Association at the funeral services: Hon John W. Davis, chairman, Hon. Charles S. Whitman, Hon. William D. Guthrie, Hon. William L. Ransom and Hon. Arthur E. Sutherland.

The services were held on Monday morning, March 12, at the Protestant Episcopal Church of the Heavenly Rest. They were attended by many of the leading members of the Bench and Bar with whom Mr. Boston had been associated in his many activities. There was a special delegation from the New York County Lawyers Association, of which Mr. Boston had also been President. The burial took place in Eastchester. He is survived by his widow, Ethel Lyon Boston; a daughter, Mrs. J. Holmes Daly of Hewlett, L. I., and a son, Lyon Boston, an Assistant District Attorney of New York County.

Mr. Boston was born in Baltimore, the son of John E. H. and Cecilia (Guyton) Boston. He was educated in Baltimore at private and public schools, Baltimore City College and Johns Hopkins University. He was graduated in law at the University of Maryland in 1886, and was admitted to the Bar in that year.

After a short period of practice in Baltimore, he moved to New York, where he was admitted to the Bar in 1889. He was a member of the firm of Baldwin and Boston in that city from 1893 to 1901. In the latter year he became associated with Hornblower, Byrne, Miller and Potter, and from then on until his death was a member of this and the firms which succeeded it. During this period he took part in a great deal of important litigation, participating, among other important cases, in the litigation and reorganization of the United States Shipbuilding Co. and its subsidiaries, the suit for the dissolution of the American Tobacco Co., and in litigation concerning the estate of "Diamond Jim" Brady. He also wrote many articles on international and constitutional law, medico-legal and ethical subjects.

In the American Bar Association he served as chairman of its committee on Professional Ethics, chairman of its Special Committee on Supplements to the Canons of Professional Ethics, and chairman of the Special Committee on the Law of Aviation. He also served as Vice-President and member of the General Council from New York, and as a member of the Executive Committee. He was also chairman of the Conference of Bar Association Delegates in 1922, and always took particular interest in the work of that body. He was president of the Association, 1930-31.

Survey of Disciplinary Methods Completed by Association—To Aid in National Bar Program

ON March 15, 1935, the American Bar Association issued a pamphlet dealing with disciplinary procedure in every state in the Union. This pamphlet is one of the projects of the National Bar Program and it is issued in line with the suggestion of the Association in its meeting of last year that all bar associations concentrate actively on ridding the profession of dishonest and unethical practitioners.

In the foreword to the pamphlet, the Committee of the Association on Professional Ethics and Grievances points out that the entire bar has been "irregularly and unjustly indicted by the public and is now on trial." The extremely negligible number of lawyers "who are false to their oaths of office, false to the courts, false to their brother lawyers, and false to their obligations to the public" should be immediately and speedily prosecuted, the committee declares.

Realizing that the burden of this task is on the local and state bar associa-

tions, the attempt has been made through the medium of this pamphlet to create better methods of disciplinary procedure and indirectly to build up a local sentiment demanding adequate discipline against unethical lawyers. Attention is called to the fact that it is the active duty of every lawyer to file a complaint wherever a substantial instance of unethical conduct comes to his attention.

The shyster, the committee vigorously asserts in its foreword, has "no place as member of an honorable and dignified profession. The public inquires if the bar is ready, able, and willing to rid itself of such malefactors. We trust that a satisfactory answer to this question will be made shortly by the bar of the whole country. Indeed, it must be made."

In one of the tables included in the pamphlet, it is shown that only 27 states keep statewide records of disciplinary proceedings. For the five-year period, 1929-1934, two states, Indiana and Iowa, have disbarred only eight lawyers in every ten thousand, while four others have disbarred less than three attorneys in every thousand practicing in the state. On the other hand, four states have disbarred over ten lawyers for every thousand practicing in the state, and one state has reprimanded over 129 lawyers per thousand lawyer population for unethical conduct.

In addition to the foreword prepared by the Committee, the sixty-four-page pamphlet contains an account of disciplinary procedure in every state, some summary material, two charts and a bibliography. Data for the accounts of the disciplinary procedure in the states was collected by Will Shafroth, Director of the National Bar Program, assisted by Wm. H. Robinson, Jr., of the headquarters staff from material submitted by state and local grievance committees. After these data were assembled, they were returned to the committees in each instance to be checked and approved before being printed.

A general description of the source of authority of each committee is set forth, and the states are grouped under their three functional classifications; that is, the states are divided into those groups which function as disciplinary committees under legislative authority, those which function under court rule, and finally those which have neither legislative nor judicial authority for their existence.

Members of the Committee on Professional Ethics and Grievances are: Francis J. Carney, chairman; Arthur E. Sutherland, D. J. F. Strother, George B. Martin, Orie L. Phillips, George B. Harris, and Herschel W. Arant.

Copies of the pamphlet are being mailed to chairmen of state and local grievance committees, chief justices of courts of last resort, and various other officials. A limited number of copies are available to other persons on request to the Association headquarters at 1140 N. Dearborn St., Chicago.

Seven States Adopt Bar Examiners' Plan for Investigation of Attorneys of Other States Applying for Admission

THE seven states of California, Delaware, Minnesota, Nevada, Oklahoma, Texas and Washington, have now adopted the plan offered by the National Conference of Bar Examiners for the investigation of the character and record of attorneys applying for admission on the basis of practice in another state. Over fifty of these foreign attorneys have been reported on. The method used is simple. The Conference communicates with all references furnished by the applicant and then makes a further investigation in each place where he has practiced. This is done either by letter or by a paid investigator.

The results thus far have been excellent and with the adoption of the plan by additional jurisdictions where it is now being considered, the continuance of this service seems assured. The plan has been approved by the Council of the Section of Legal Education of the Bar Association.

A charge of $25.00 per applicant is made and this is either added to the fees which he must pay to secure admission to the bar or else, as in Oklahoma and Texas, the foreign applicant is obliged to furnish such a report from the National Conference of Bar Examiners and makes his payment directly to them.

Trend of Later Lower Federal Court Decisions Adverse to National Recovery Act — Favorable Decisions to Date, However, Far Outnumber Unfavorable Ones — Appeals Planned

THERE have recently been a number of decisions adverse to the National Recovery Act in lower Federal Courts. In the so-called "Weirton case" Judge John P. Nields, in the Federal District Court of Delaware, held that Section 7A, the collective bargaining section of the National Recovery Act, was unconstitutional when applied to companies not engaged in interstate commerce.

On the same day Judge Charles I. Dawson, in a Federal District Court in Kentucky, granted a temporary injunction against enforcement of the Bituminous Coal Code. His decision came after the Circuit Court of Appeals had remanded the case to him for findings of fact on the issue of whether the coal operators would suffer irreparable injury from the enforcement of the code. However, he reaffirmed his previously announced conclusion that the law under which the Code was promulgated was unconstitutional.

In New Orleans on March 6 Judge Wayne G. Borah denied an application of the Government for an injunction to restrain a box manufacturer from alleged violation of the maximum hour and minimum wage provisions of the Lumber Code. However, the constitutionality of the National Recovery Act was not involved in this proceeding.

On March 13 Federal Judge Guy L. Fake, in granting a New Jersey manufacturer an injunction restraining the Government from enforcing the Fabricated Metal Code regulating the hours of labor, wages and the payment of Code Assessments, held the Act unconstitutional. "We can arrive at no other conclusion," said Judge Fake, "than that the Recovery Act is unconstitutional because it attempts an unlawful delegation of legislative authority."

He held furthermore that in so far as the Act and a Code under it attempt to regulate hours of labor and wages in manufacture, they violate the Tenth Amendment, which reserves to the States or the people the powers not delegated to the United States by the Constitution. Congressional authority under the Commerce clause, he declared, does not extend to manufactures, even if the manufactured articles find their way into interstate commerce.

Attorney General Cummings has announced that important decisions against the New Deal would be taken to the U. S. Supreme Court for decision, placing in the list the Weirton case and the Western Kentucky Coal case. He said it was "fair enough to say that the decisions of the Federal District Courts are multiplying in a whole group of cases affecting recent legislation, and this is as it should be and of course was anticipated. The Acts are in process of being clarified and interpreted by the courts.

"I think there is a tendency to overemphasize particular decisions as if they were final, drastic or conclusive. I know it is natural to dramatize practically all events, but these court cases are part of the good old American

process of finding out what is going on. None of these District Court decisions is conclusive. There are numerous ones and they are not all in harmony. Ultimately the Supreme Court will have to act, and that applies to all of the cases."

At the National Recovery headquarters it was stated that on Feb. 28 the Government had suffered twenty-four unfavorable Federal Court decisions on various aspects of the Recovery Act, while 130 favorable decisions had been rendered and 69 cases were pending.

Two State Acts designed to supplement the National Recovery Act were upset in March. The Wisconsin Supreme Court declared the State Recovery Act unconstitutional on the ground that it unlawfully delegated legislative power to industry. In New York the Shackno Act, providing that the regulations of the NRA shall apply to intrastate commerce and setting up authorities to govern such business, similar to the Federal bodies, was declared unconstitutional by the Appellate Division of the Supreme Court, Third Department. Presiding Justice Hill declared that the Act was not only an unconstitutional attempt to delegate legislative authority, but it amounted to a complete abdication by the Legislature.

Fight Against "Lawyer Criminal" Being Pushed on Several Fronts—Attorney General Cummings Sounds Call for Campaign—President Loftin Pledges Cooperation—Activity in Philadelphia and New York

BRISK firing is reported from several points in the fight against the "lawyer criminal." In the Saturday Evening Post of March 16, U. S. Attorney General Cummings delivers a scathing denunciation of "these renegades and scavengers of the legal profession," who "are rapidly submitting the entire fraternity to unwarranted criticism."

"To my mind," he continued, "this is an outrage; the many thousands of honest, faithful, highly ethical men of the law must suffer because the criminals in their ranks are not quickly and thoroughly punished. Yet the blame is partly theirs. For years the good have felt themselves aloof from the bad. Now they find that people do not differentiate; if one lawyer is a crook, it is reasoned that all must be crooks.

"The Department of Justice, which I have the honor of heading, intends to do all within its power to end that condition, but alone, its task may be overwhelming. A great supporting arm must be the vast body of ethical attorneys. Courts must awaken to their duty in this cleansing process. And there are other factors highly necessary, if the criminal and his equally guilty lawyer are to be eradicated.

"Cherchez L'Avocat!"

"I am fully convinced that in practically all widely expanded gang activities there is some person of legal brain and training who directs the campaign. Moreover, there is evidence which leads me to believe that in at least three kidnapings of major importance there was legal direction and assistance before the abduction was carried out."

The Attorney General's article gave some very definite examples of "lawyer criminals" who had been brought to the attention of his department. However, he was careful to say that they constituted but a small part of the legal profession and that his remarks were not to be taken as a tirade against attorneys but rather as a defense of them. "As a lawyer," he said, "I have come to know the vast number of them who are honest, capable and proud to abide by the highest ethics of their profession. Therefore, in their defense and that of the public, I am asserting an unrelenting determination to stamp out those who disgrace the profession they are pledged to uphold."

The Attorney General emphasized the importance of a sound public opinion to support the efforts of all agencies to rid the profession of the "lawyer criminal." And in this connection he spoke very pointedly of the bad effects of that sort of unsound public opinion which admires and applauds the shrewd and too often successful maneuvers of the "lawyer criminal" to aid the criminals to evade justice. He concluded by calling on every Bar Association and every court to aid the Government in the fight to purge the legal profession of this type of practitioner. But he pointed out that the Government can act only within its limited jurisdictional sphere and that beyond that sphere the matter is one for the State, City and County.

President Loftin Indorses Call and Pledges Help

President Scott M. Loftin of the American Bar Association, in a published interview, declared that the call issued by the Attorney General to aid in detecting, apprehending and punishing the small group of lawyers who participate in criminal enterprises would have the hearty cooperation of every right-thinking lawyer. President Loftin pointed out that the enforcement of professional ethics is a part of the National Bar program on which the American Bar Association is laying great stress.

"It is not generally known," he continued, "that there are at the present time in the neighborhood of 1,000 lawyers over the country who are participating in the work of national, state, and local disciplinary committees for the purpose of policing the legal profession and punishing any lawyers guilty of unethical conduct.

"At the last meeting of the American Bar Association in Milwaukee, a resolution was passed recommending that state and local bar associations concentrate actively on ridding the profession of dishonest and unethical practitioners. Shortly following this, a survey of present methods of disciplinary procedure in the profession was undertaken and this has just been completed and is being issued in pamphlet form during the present week. The keynote of that pamphlet is a plea for more efficient and energetic action by bar associations. As the Attorney General stated, 'this will only be effective if it has public support.'

"The American Bar Association," President Loftin concluded, "is pleased to join hands with the Federal Department of Justice in this campaign to eliminate the shyster."

Unethical Lawyers and the "Numbers Racket" in Philadelphia

In Philadelphia the recent report of a special committee of the Philadelphia Bar Association charged with the investigation of improper practices of lawyers in criminal cases has resulted in uncovering what is regarded as proof of the alliance of unethical lawyers with the gangs who control the "numbers racket"—a form of gambling which seems to have been flourishing in the Quaker City for some time.

The appointment of the special committee followed a communication from Judge Horace Stern of the Court of Common Pleas to Hon. Roland S. Morris, Chancellor of the Philadelphia Bar Association, in which he said:

"There is a firm and widespread belief that criminal gangs and racketeers regularly employ members of the bar with whom they consult and from whom they obtain professional advice and guidance in their systematic lawbreaking, that they engage these lawyers to defend in court their agents and hirelings if they should happen to be arrested in the course of their criminal operations, that it is the heads of the organization who pay the lawyers their fees, that the actual defendants in court

are represented by counsel thus furnished to them, never having seen or heard of the lawyers until they appear beside them at the bar of the criminal court. I need not point out to you the distinction between a lawyer properly representing a person charged with the commission of crime and a lawyer retained to defend persons in crimes thereafter to be committed as part of a regular, continuous, criminal *business*.

"If such a disgraceful relationship exists between organized crime and members of the bar—and there would seem to be some reason to believe that it does—it is for the bar itself to clean house and to put a stop to such practices. Indeed it is only through an adequate conception of the obligations to the public of lawyers practicing in the criminal courts, and a greater social consciousness on their part, that the deplorable criminality which menaces our lives and our property can ever effectually be overcome."

The Board of Governors of the Association held a special meeting in which it authorized the Chancellor to pledge the cooperation of the Association in the conduct of an investigation and in the making of recommendations in accordance with its results. It also empowered him to appoint the necessary committee, which he promptly proceeded to do. The committee, while regarding itself as charged to search out all irregularities of practice in the criminal courts, confined itself in its first report to the so-called "numbers racket" and the "drunken driver racket" which it seems to have come upon incidentally in the course of its investigations.

Committee Presents its Conclusions

The conclusions of the committee are stated in the report as follows: "From their own reluctant and sometimes unconscious admissions and from the overwhelming testimony of others we have concluded that certain attorneys have been guilty of grossly improper conduct in connection with the numbers racket. We have also concluded that certain attorneys have been guilty of grossly improper conduct in connection with the drunken drivers racket." Then follows a description of these two rackets, the first being a highly organized system of commercial lottery in which the winning number is determined daily by the results of horse races at a certain track which has been agreed upon, and the second being a scheme whereby, through a system of early notices from subordinate official employees, the runner gets to those arrested as drunken drivers and arranges for the bond, attorney and other details for a sufficient consideration.

The committee presented the names of several attorneys alleged to have been involved in these improper practices, and these were later directed by the Board of Judges of the Common Pleas Courts to show cause why they should not be disciplined for "unprofessional practice." The hearings were held in public.

In New York City District Attorney William C. Dodge has instituted an investigation into the "policy racket," the vice racket and other devices of that character. In an endeavor to reach the "higher ups" he is trying to get lawyers to reveal who retained them in vice and policy cases and has announced that he will ask the courts to hold those who refuse to do so in contempt of court. The Association of the Bar of the City of New York is ready to begin disbarment proceedings against any lawyers who are mixed up in these rackets, according to President Thomas D. Thacher.

A "Grand Slam" for the Judicial Council of South Dakota

THE South Dakota Judicial Council is able to report that all of the bills sponsored by it were enacted without change by the 1935 Legislature. The following summary of the measures is furnished by Hon. Van Buren Perry, Circuit Judge and Secretary of the Council:

1. An act requiring a defendant in a criminal case to give the prosecuting attorney advance notice of intention to claim alibi as a defense. This act duplicates the Ohio statute which has been reported as highly satisfactory, and which the highest court of that state has twice held to be constitutional.

2. An act conferring upon peace officers of foreign states all the powers of corresponding peace officers of this state, while in pursuit of a fugitive charged with a felony, or while transporting an arrested prisoner to a foreign state for trial; provided such foreign state gives similar powers to the peace officers of this state. This act carried an emergency clause and is now in effect. It is in the nature of a compact between states as authorized by the act of Congress of June 6, 1934, being a reciprocal statute, and is designed to eliminate the advantage which a fleeing fugitive formerly gained by crossing state lines. The act does not dispense with extradition, which occurs as provided in the uniform criminal extradition act, if demanded.

3. A series of acts setting up a new system for the selection of jurors in all courts of record. The former laws required panels to be drawn by lot from lists containing the names of all male citizens between 21 and 70, not specifically exempted or disqualified. The new acts install a system in which jurors will be selected because of their qualifications. A master list of those deemed qualified is to be compiled annually, the number depending on the size of the county. Each township and municipality is given representation upon the list in proportion to its voting strength. The governing board of each district selects twice the number allotted to the district and certifies them to the clerk. One-half of these are then eliminated by a lottery, and the remainder constitute the master list, from which panels are drawn by lot as ordered by the Court. Every man drawn will have behind him the sworn recommendation of the governing board of his home district.

It is believed that the average moral and intellectual standard of jurors will be materially improved, with resulting saving in time required to select jurors and try cases, and more fearless and intelligent verdicts, reducing the number of new trials and appeals, and the probability of miscarriage of justice. The jury system provided by the new acts is especially designed to serve the needs of a state having no large metropolitan centers.

Plans Adopted for Organization of Junior Bar Section of Pennsylvania State Bar Association

DEFINITE plans for the organization of a Junior Bar Section of the Pennsylvania Bar Association were adopted at the meeting of the Executive Committee of that body at Harrisburg on March 4.

Mr. Burtt Harris, of Pittsburgh, chairman of the Junior Bar Conference of the American Bar Association for the State of Pennsylvania, made a report to the Executive Committee, urging that action be taken to interest the younger members of the Bar in the general project and also in the formation of a section of the State Bar Association which would give the younger men a greater opportunity to contribute to the support and advance of the profession. President Moorhead thereupon promptly appointed a special committee, consisting of Harry S. Knight, George J. Campbell, Walter B. Gibbons, Burtt Harris and George H. Hafer to consider the subject.

The committee's report, which put the undertaking on solid ground, was presented and adopted. It recommended the creation of a Junior Bar Section of the State Bar Association, with the usual objects and qualifications for membership. It also provided that the present Chairman of the Association's Committee on Membership, Walter B. Gibbons, Esq., of Philadelphia, and

Burtt Harris, Esq., of Pittsburgh should be constituted a committee, with power to add such members in the different zones and counties of the State as they might select, for the purpose of interesting eligible members of the Association in the Section, and also of inducing eligible nonmembers to join the Association and the Section.

It was further provided that this committee should formulate rules and regulations for the government of the Section in accordance with the rules and regulations of the American Bar Association and the By-Laws of the State Bar Association; that it should extend an invitation to all members of the Bar of Pennsylvania who are eligible for membership in the Junior Bar Section to attend a meeting of the Section at the next annual meeting of the Association at Bedford Springs; and that it should formulate and submit a draft of sufficient changes in the By-Laws to effectuate the establishment of the Junior Bar.

The committee making the report was constituted an advisory committee to assist in the organization and perfection of the Section.

Drafts Considered at Recent Meeting of Council of American Law Institute—Progress on Restatement Quickened, As Shown by Work Submitted

THE Council of the American Law Institute held a meeting in New York on Jan. 30-Feb. 2. At this meeting the Council gave its attention to a series of drafts which collectively represent a greater advance in the work of restating the law than has been achieved in any similar period since the establishment of the Institute. Work in progress was evidenced by new or revised drafts in Trusts, Torts, Property, Quasi-Contracts, Sales of Land and the Administration of Criminal Law.

In the subject of Trusts, Mr. Scott and his advisers submitted a revision of Tentative Drafts 1 to 5, covering Chapters 1 to 11, and a draft of Chapter 12, dealing with Resulting Trusts. The material on Resulting Trusts completes the Restatement of this subject, although the form is not yet definitive. A proposed final draft will be submitted to the members of the Institute at the annual meeting in May. Subject to such change as may be directed by the membership and Council, the official draft of Trusts will be issued in the fall of 1935, taking a place alongside the Restatements of Contracts, Agency, Torts and Conflict of Laws.

Work on the Restatement of Torts was advanced by the submission of two new chapters. Mr. Bohlen, Reporter for the subject, presented a chapter on "Absolute Liability," dealing with the liability of possessors and harborers of animals. One of the questions which enlivened the discussion under this head was whether or not the bite of a watch dog off duty is privileged to the same degree as the bite of a watch dog on duty. As presented by the Reporter and his advisers, the section concerning watch dogs stated that a possessor of land or chattels is privileged to protect his property by keeping therein a watch dog under the same conditions as those which fix his privilege to use a mechanical protective device.

Liability for Watch Dog Off Duty

A comment to this rule asserted that if the circumstances are such as to give the possessor of land the privilege to employ a watch dog as protector, the dog, even during the time when it is not busy at its work on the premises, if kept with the care which its dangerous nature requires, is not kept at the risk of absolute liability, such as attaches to the possession of abnormally dangerous domestic animals. The phrase, "an abnormally dangerous domestic animal" means an animal whose behavior is not common to its class, such as a Great Dane in the habit of leaping in play on children or a horse playfully putting its forefeet on people's shoulders. It does not include stallions, bulls or other stud animals. Ferocity, in other than a watch dog, would stamp the dog as abnormally dangerous. The guiding consideration in fixing the privilege is the social purpose served by the animal.

According to the position of the Reporter and most of his advisers, anyone privileged to employ a dog for such purposes would be subject to no greater liability for a bite inflicted by the dog when "off duty" than would the possessor of any domestic animal, such as a bull or stallion for any injury caused by them. The Council regarded this as a matter of sufficient interest to bring it before the attention of the general membership of the Institute at the annual meeting in May.

Liability for Straying Live Stock

Another question coming up for debate in this connection was, "Shall the owner of livestock be compelled to fence them *in*, or the owner of premises upon which they may roam be compelled to fence them *out?*" Mr. Bohlen's draft stated a rule to the effect that a possessor of livestock which stray upon the land of another is liable for their intrusion and any consequent harm, although the possessor used every care to prevent the straying. (This rule is qualified in respect to livestock straying while being driven on a highway.) The draft stated the English common law rule. It contained a Special Note calling attention to the fact that in many States the common law rule had been rejected as unsuited to the conditions prevailing in the State in question or in some part of it. Certain members of the Council, particularly those from the south and southwest, questioned whether the attitude of these States was sufficiently emphasized by a Special Note. The matter was left to the Director and the Reporter to find a form which would sufficiently call attention to the attitude of these courts.

A chapter on "Invasions of Interest in Reputation," dealing with the general topic of defamation, was submitted by Mr. Harper, the Reporter for this chapter. Further work in the Restatement of Torts will be carried on continuously.

Two Preliminary Drafts on Property

Additional work on the Restatement of Property was reflected by two preliminary drafts prepared by Mr. Powell and his advisers. These drafts embraced four chapters, covering the following subjects: Protection of Future Interests as Against Acts and Omissions to Act of Persons Other Than the Owner of the Possessory Interest; Protection of Future Interests as Affected by Statutes of Limitations and the Doctrine of Prescription; Ineffectiveness of an Interest in Its Inception and Effect Thereof Upon Prior or Succeeding Interest; Termination of an Interest as Affecting Succeeding Interests.

The subject matter dealt with under the title of "Restitution and Unjust Enrichment" includes the subjects commonly known as Quasi-Contracts and Constructive Trusts, together with that portion of equity which deals with Rescission and Reformation so far as it involves Restitution. The Restatement deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer a loss. Professors Warren A. Seavey and Austin W. Scott of the Harvard Law School, together with their advisers, submitted drafts on the first chapter of Part I of this subject, dealing with the Right of Restitution.

The Restatement of the subject "Sales of Land" was started by the Institute in 1934 with Professor Samuel Williston of the Harvard Law School as Reporter. Mr. Williston and his advisers

submitted a draft of the first three chapters for the consideration of the Council. This draft covered Definitions, The Requirements for an Enforceable Contract for the Sale of Land and Contractual Obligations.

Revision of Model Statute on Double Jeopardy Presented

In accordance with a resolution adopted at the annual meeting of the Institute in 1932, a revision of the model statute on Double Jeopardy was submitted by Mr. William E. Mikell and his advisers. The basic principle followed in the text of this draft is that an acquittal or conviction—not jeopardy of conviction or punishment—is a bar to a second prosecution for the same offense. A section of the proposed final draft as submitted at this meeting has an interesting history.

When this subject was first presented to the membership of the Institute at its annual meeting in 1932, the Reporter had included a section stating, in substance, that where trial is by a judge without a jury, a postponement after a witness has been sworn constitutes a bar to subsequent prosecution of the defendant for the same offense. This rule was rejected by the membership of the Institute and the Reporter later prepared a revised statement which was considered by the Council at its recent meeting.

The revised version of the rule stated that, "if during the trial of a person for an offense by a judge without a jury the trial is postponed without good cause and to the manifest injustice of the defendant, without the consent of or waiver by the defendant, such postponement shall be a bar to a further or another trial of the defendant for any offense of which he might have been convicted on the original trial." However, despite the deletion of the condition, "after the calling of a witness," and the qualification of the statement by such phrases as "without good cause," and "manifest injustice," the Council after discussion, voted to omit the section. The redrafted statute will be submitted to the annual meeting in May.

The action of the Council upon the material presented to it was preliminary to a submission for the approval of the general membership of the Institute at the annual meeting in May. Copies of the revised drafts are sent to the membership of the Institute many weeks in advance of the meeting so that members may have opportunity to carefully read the drafts and be prepared to discuss them.

State Legislatures Prepare to Act on American Bar Association's Recommendation for State Departments of Justice—A Glimpse at Some Measures Introduced

HIGHLY organized and highly mobile criminal elements have brought very forcibly to the attention of the public the need for a better organized and a better equipped law enforcement agency to combat such elements. Some have suggested that the Federal government should assume this responsibility and have designated the dependable Department of Justice as the proper leader in attacking the problem. Aside from the point of the Constitutional questions involved, there has been a repeated disinclination on the part of the Federal Department to shoulder the whole burden. The feeling has been rather that adequate machinery should be developed in each state to cope with the problem there. The American Bar Association recognized this need when it recommended in August, 1934, that a State Department of Justice, headed by the Attorney General or such other officer as might be desirable, be created in each state. The officer heading the department was actively to supervise the work of district attorneys, sheriffs and other law enforcement agencies. It was recommended that his office include a central bureau of criminal identification and be equipped with investigators similar in character and qualifications to those now attached to the Federal Department.

Since that recommendation was made, California adopted an amendment to its Constitution which unifies the work of its most important law enforcement agencies by placing them under the control of the State's Attorney General. This measure was discussed in an article by the Hon. W. A. Beasly in the December, 1934, number of this JOURNAL, at page 757. During the present legislative session at least eight states are known to be considering the creation of such departments. An enabling act to carry out the purposes of the constitutional amendment has been introduced in California. Massachusetts plans to make its state department of justice a model for the nation, according to recent notices appearing in the press. The plan calls for a centering of present anti-crime agencies under the Attorney General. A "Division of Investigation" will be established, in addition to bureaus of detectives and public safety, of identification and of training.

In New York, Representative Pritchard H. Strong has introduced a measure which has generally been referred to in the metropolitan press as a "Scotland Yard Bill." It elaborates on the proposal of the American Bar Association by proposing a bureau in the Department of Law with four divisions: investigation, criminal identification, state police, and police administration. The Attorney General under this bill would be duty bound to see that the laws of the state were enforced and would be given sufficient power over local officials to accomplish this end.

It should be noted from past experience that a law which allows the Attorney General to supervise prosecuting attorneys and requires reports from them does not mean necessarily that anything will be done. In practice under such laws the Attorney General has not done anything at all for the betterment of law enforcement or for the coordination of law enforcement agencies within the state. The California amendment is mandatory in its terms, the responsibility of the Attorney General being couched in unmistakable terms.

South Dakota, Ohio, Nebraska and Texas will be building on the bases already existing in their governmental structures if the bills introduced in those states are passed. The historic Texas Rangers will be blended into a Department of Public Safety and Welfare. In other states, such as West Virginia and North Carolina, the idea is being considered by public spirited groups, although word has not been received of bills being presented in the legislatures of these states. The Commissioners of Uniform State Laws are now engaged in the preparation of a bill for the creation of such departments which should be available when the legislatures reconvene.

President Loftin Speaks Encouragingly to Future Lawyers at Yale —What the Head of the Association Is Called on to Do during Term of Office

IN a recent address before the law students of Yale University President Loftin gave the future lawyers an unusual bit of encouragement. Whereas it has been customary on this and other occasions to dwell particularly on the overcrowded condition of the profession, President Loftin told the Yale students that the law is no more overcrowded at the present time than other

professions or businesses, and that "with the return of normal business activity there will be ample work in the profession for attorneys and those students who will soon be admitted to the Bar. However, he reminded them that success in the law depends largely on hard work. This is from an account in the New Haven Courier of Feb. 25.

President Loftin spoke to the Yale law students after he had addressed prominent Connecticut and New Haven lawyers at a luncheon given in the Sterling Law Quadrangle by Dean Charles E. Clark of the Law School. He urged the lawyers to back the objectives of the American Bar Association as embodied in the National Bar Program. He spoke particularly of the need for establishment of State Departments of Justice as a means of bringing about better enforcement of the criminal law.

This New Haven engagement of President Loftin is typical of the professional and public relations campaign which the President of the American Bar Association, under present conditions, is called upon to conduct almost from the time he is inducted into office. The time has gone by when the position of president was merely one of honor. It is a working place. A reference to the report of President Loftin to the Executive Committee at its midwinter meeting will give some idea of the time he is called on to devote to his task.

He has addressed numerous city and State Bar Associations, among the latter those of Missouri, Illinois, Iowa, Florida, Georgia and Oklahoma. He has paid special attention to the work of the National Bar Program, stressing it in his addresses over the country, and delivering a radio speech with the object of bringing it to the attention of the large audience of radio hearers. He attended the Boston conference of Bar Associations of the First Circuit called to consider means of aiding the National Bar Program. He took an active part in the Attorney General's Crime Conference at Washington, heading a strong delegation from the American Bar Association. Previous to the midwinter meeting of the Executive Committee he had addressed the law schools at Harvard and the University of Florida, with the object of acquainting the students with the aims of the Association, and planned to address several others in the near future. Since then he has addressed the students of Washington and Lee University. He has delivered numerous addresses to the local associations in his home state of Florida, and has also carried the message of the Association to several important lay organizations in that state.

This represents merely some of the "speaking" demands on the time and energy of a President. Add to this his committee appointments, his correspondence and contacts with them and their work, his various public statements on such important matters as the World Court, the Child Labor Amendment and the like, the large volume of personal letters to be written and sent out from his office in connection with the projects of the Association, and the important demands of the regular routine of Association business, and one understands why Presidents are strongly in favor of a term of only one year.

Campaign Planned to Discipline Lawyers Assisting Lay Agencies in Unlawful Practice—Committee on Professional Ethics and Grievances Meets

A CAMPAIGN to discipline the lawyer who assists a lay agency in engaging in unauthorized practice of the law was mapped out at a meeting of the American Bar Association Committee on Unauthorized Practice of the Law at Chicago on March 16-17. It was the view of the members of the Committee that a great part of the unlawful practice activities through which the public is victimized would cease if all members of the bar refused to take part in them, and for this reason the approval of the Executive Committee was asked of a recommendation that lawyers who violate the canons of ethics in this way be brought before state and local grievance committees for disciplinary action.

Conferences were held by the Committee with a committee from the National Association of Real Estate Boards; with Mr. H. O. Edmonds, Chairman of the Committee on Cooperation with the Bar of the American Bankers' Association; with Mr. L. Duncan Lloyd, Chairman of the Unauthorized Practice Committee of the Chicago Bar Association; with Mr. Martin J. Teigen, Executive Secretary of the Commercial Law League, and with the Committee on Professional Ethics and Grievances of the American Bar Association.

Some time was spent in discussing the manner in which more interest in curbing unauthorized practice of the law can be stimulated, and in a method by which more bar associations can be induced to appoint committees on this subject. It was announced that there were at the present time in the files of the headquarters office of the Association the names of approximately 1,000 members of the 166 state and local bar association committees dealing with unlawful practice.

Letters were read indicating approval by the bar of the Committee's publication, "Unauthorized Practice News," which is now being circulated monthly without charge to a mailing list of 1,500. In this publication most recent decisions on the subject are digested and reports are printed of committee activities in all parts of the country. It was announced that a few copies of the Handbook on Unauthorized Practice of the Law by Professor Hicks and Mr. Katz of the Yale University Law School are still available.

(*Continued on page* 250)

CONFLICTING TAXATION AT THE SECOND INTERSTATE ASSEMBLY

Principal Discussions Were Centered on Immediate Reforms Designed to Eliminate or Reduce Federal-State Tax Conflicts and on Long-Run Measures to Meet Conditions Not Easily Satisfied by Emergency Legislation—Proposals Concerning Gasoline, Tobacco, Beer and Electric Utility Taxes—Bare Majority Approves Resolution to Allow Credit Against Federal Income Tax for State Individual Income Tax Paid or Accrued—Long Range Measures Considered, etc.

By James W. Martin

Research Director, Interstate Commission on Conflicting Taxation, and Director (on Leave) Bureau of Business Research, University of Kentucky

I. Origin and Activity of the Interstate Commission on Conflicting Taxation

THE American Legislators' Association in the autumn of 1932 became keenly conscious of the conflicts between federal and state tax plans. It observed, for instance, that both federal and state governments were imposing income taxes, that both levied tobacco taxes, and that both were collecting inheritance and estate taxes (and, incidentally, that the plan of coordination previously effective in the estate tax field was not extended to the added rates). The Association believed that such practices were rapidly becoming intolerable to taxpayers and were seriously impeding economic progress.

The First Interstate Assembly and the Interstate Commission on Conflicting Taxation

With these facts in view the Association issued a call for an assembly of states to convene in Washington, February 3 and 4, 1933, to consider problems of overlapping taxation. Every state was invited to send three delegates to this meeting—a house member, a senator, and a fiscal official named by the governor. During these discussions it became apparent that, because the situation was so complex, no program the Assembly might then adopt would be entirely sound. Accordingly, the Interstate Assembly directed that the President of the American Legislators' Association appoint a commission composed of ten or more persons, including legislators and tax administrators, to give the problem intensive study.

Work of the Interstate Commission on Conflicting Taxation

The activities of this Interstate Commission on Conflicting Taxation[1] fall primarily in three fields: (a) research, (b) conference and deliberation, and (c) negotiation to secure enactment of proposed legislation.

The research work is carried on at the Chicago offices and is primarily designed to estimate the influence of proposed changes in the tax system which might reduce the evils of conflicting levies. Since 1933 the Commission staff has produced a number of formal reports,[2] and a considerable number of articles for *State Government*.[3] Prior to the autumn of 1934 the Commission maintained a tax expert assisted by the regular members of the American Legislators' Association staff. Since September 1, 1934, a research staff has been developed which now includes five persons.

Since its appointment in February, 1933, the Commission has held seven meetings. It has also held three informal sessions with members of Congress. Formal meetings have usually lasted two days with sessions in the mornings, afternoons, and evenings. Sometimes problems of organization and procedure were discussed; at other times specific proposals for tax reform were considered. Usually the deliberative work of the Commission has been carried on in executive session.

The Commission has conducted certain negotiations with members of congress, particularly with the leaders of the House Committee on Ways and Means and the Senate Finance Committee. The chairman and the secretary of the Commission presented the Commission's viewpoint on gasoline and liquor taxation to the Committee on Ways and Means. On another occasion the Commission met jointly with members of the two congressional committees and administration representatives to discuss the entire problem of conflicting taxation and to make known to the federal representatives its viewpoint on specific questions. Following the negotiations, Chairman Pat Harrison of the Senate Finance Committee showed a co-operative viewpoint by appointing a subcommittee on double taxation. The Committee also agreed in a formal report that, "This committee is of the opinion that the gasoline

1. Seabury C. Mastick, New York, Chairman; Henry W. Toll, Colorado, Executive Secretary.

2. *Is the Interstate Commission on Conflicting Taxation Worth Its Salt?*, March, 1933; *Elimination of Tax Conflicts*, March, 1933; *Fiscal Coordination through Intergovernmental Agreement*, November, 1933; *State-Shared Federal Sales Tax*, March, 1934; *Pertinent Statistical Data Relative to Various Proposals for Reducing Tax Conflicts*, March, 1934; *Coordination of Federal and State Tobacco Taxation*, April, 1934; *Problems Preliminary to a Study of Conflicting Taxation*, September, 1934; *Recent Income Tax Policy in the Light of Experience*, December, 1934; *Sales Taxation: State vs. Federal*, January, 1935; *The Corporation Income Tax and the Crediting Device*, January, 1935; *The Personal Income Tax and the Crediting Device*, February, 1935.

3. "Conflicting Taxation," February, 1933; "Interstate Commission," May, 1933; "333 Conflicts" (table), May, 1933; "Recommendations Contained in First Report of I. C. C. T.," July, 1933; "The Story of the I. C. C. T." July, 1933; "Friendly Negotiation Instead of Federal Coercion," July, 1933; "Tax Mimicry," July, 1933; Report on gasoline, tobacco, liquor and electric energy taxes, July, 1933; Report concerning Recommendations for Taxation of Alcoholic Beverages, November, 1933; "Splitting the Liquor Taxes," December, 1933; "Federal-State Liaison" (recommendations to Ways and Means Committee and Senate Finance Committee); "Conflicting Gasoline Taxation," January, 1934; Report on the May 18-19 meeting of the I. C. C. T., July, 1934; Report on the September 29-30 meeting of the I. C. C. T., November, 1934; "Current Tendencies in State Taxation," January, 1935.

tax should be reserved for the states after June 30, 1934."[4]

The Second Interstate Assembly

On February 28 and March 1-3 the Second Interstate Assembly under the joint sponsorship of the American Legislators' Association and Council of State Governments[5] convened in Washington, D. C., to consider the report of the Interstate Commission on Conflicting Taxation and to discuss other interstate problems of taxation. In addition brief consideration was given to other sorts of federal-state problems. The principal discussions were centered on immediate reforms designed to eliminate or reduce federal-state tax conflicts and on long-run measures to meet conditions not easily satisfied by emergency legislation.

II. Short-Run Proposals of the Second Interstate Assembly

Certain tax conflicts appear to be susceptible of immediate alleviation by legislation. The Second Interstate Assembly devoted much of its time to discussing proposed legislation for the immediate alleviation of tax conflicts. Generally speaking, these proposals centered around plans for separating the revenue sources of the federal government from those of the states; for coordinating general sales taxes through federal administration; for applying the crediting principle, now used in death taxation, to corporation and individual income taxes; and for solving certain minor problems by interstate agreements.

Gasoline, Tobacco, Beer, and Electrical Energy Taxes

Even though federal administration with state sharing of revenues and other plans of coordination are to be developed, it appears essential that states administer certain taxes and that the federal government administer certain others. Fiscal independence has an apparently wholesome influence on the morale of state government. Certainly, states tend to guard jealously their law-making prerogatives. Acting on this separation theory, the Interstate Commission on Conflicting Taxation caused its research staff to investigate gasoline, tobacco, beer, and electrical energy taxation.[6]

At two or three of its conferences following these investigations the Commission considered at length the proposals involved and recommended certain resolutions for adoption by the Second Interstate Assembly. Recognizing that the separation of sources of federal and state revenues had some place in tax coordination, the Second Interstate Assembly adopted by a substantially unanimous vote the following proposals concerning gasoline, tobacco, beer and electric utility taxes in the form submitted by the Commission.

Resolved, That it is the sense of the Second Interstate Assembly that the federal government retire not later than June 30, 1935, from the field of motor fuel taxation and leave that field to the states and their localities.

Resolved, That it is the sense of the Second Interstate Assembly that the state and local governments refrain from imposing heavy taxes on beer, unless they impose such taxes for regulatory purposes.

Resolved, That it is the sense of the Second Interstate Assembly that no additional tobacco taxes be adopted by the states for revenue purposes.

Resolved, That it is the sense of the Second Interstate Assembly that electric energy taxes, which have long been sources of state revenues, should be reserved for the exclusive use of the states.

Sales Taxation

The Commission has devoted considerable time and effort to the sales tax. Two reports[7] of the research staff have dealt with the proposal for a federally-administered state-shared sales tax to replace the existing state levies. The Commission reached no definite agreement; therefore, no recommendation was made to the Second Interstate Assembly.

The following resolution was introduced from the floor and debated extensively.

Resolved, That in view of the fact that some twenty-six states have been forced through emergency conditions to resort to sales taxes and in view of the complications in the administration of such tax measures due to state lines and interstate commerce limitations, it is the sense of this Second Interstate Assembly that the federal government should impose a general emergency sales tax upon a national basis allocating a substantial portion of the revenue therefrom on an equitable basis to the several states.

The vote on the measure resulted in a bare affirmative majority.

Coordination of Income Taxes

At an early point in its deliberations the Commission gave some consideration to the coordination of federal and state corporation and personal income taxes. Included in the report on *Pertinent Statistical Data Relative to Various Proposals for Reducing Tax Conflicts*, were fairly extensive statistical data concerning income taxation. The Commission, however, did not express a view on this subject. Since the autumn of 1934 other studies have been conducted.[8] The investigation of corporation tax coordination disclosed little beyond the difficulty of the problem. It was shown that taxes available for credit could be defined only with difficulty; but the showing which bulked largest in the Commission's viewpoint was that, owing to lack of data, no prediction could be made regarding the fiscal and administrative results.

The investigation of individual income taxes in relation to the proposed crediting plan was considered at some length by the Commission. While it was shown that the benefits of the crediting plan would accrue in full if only state income taxes were credited, the Commission, thinking primarily of the political considerations involved, decided to recommend that the Assembly consider[9] proposing congressional enactment of provision for crediting state

4. 73rd Congress, First Session, *Report No. 58*, p. 1.

5. The newly developed Council of State Governments is joint sponsor of the Second Interstate Assembly. It is an organization which provides information for state officials other than legislators.

6. *State Government*, July, 1933; *Ibid*, November, 1933; *Ibid*, January, 1934; *Pertinent Statistical Data Relative to Various Proposals for Reducing Tax Conflicts*, March, 1934; *Coordination of Federal and State Tobacco Taxation*, April, 1934.

In this connection, the Interstate Commission on Conflicting Taxation gave sustained consideration to liquor taxation prior to adoption of the federal tax statute. With the approval of the First Interstate Assembly, secured by mail referendum, the Commission urged that congress provide for federal collection of gallonage taxes and state administration of license taxes. This proposal was not approved because of difficulties concerning the distribution of revenues from gallonage taxes among the states. Since the Commission made no study of the situation after the enactment of liquor tax legislation, it offered no recommendation to the Second Interstate Assembly.

7. *State-Shared Federal Sales Tax*, March, 1934, and *Sales Taxes: State vs. Federal*, January, 1935.

8. *Problems Preliminary to a Study of Conflicting Income Taxes*, October, 1934; *Recent Income Tax Policy in the Light of Experience*, December, 1934; *The Corporation Income Tax and the Crediting Device*, January, 1935; and *The Personal Income Tax and the Crediting Device*, February, 1935.

9. It is of interest in this connection that, whereas other resolutions of the Interstate Commission on Conflicting Taxation recommended approval, this particular proposal came to the Assembly as a recommendation *for consideration*.

income taxes and other state and local taxes of a personal character.

The Assembly Committee on Resolutions, after full consideration of this measure, reported it without recommendation to the Assembly. After vigorous discussion the Assembly by bare majority approved the recommendation in the following langauge.

Resolved,

1. That the Second Interstate Assembly recommends federal enactment of legislation allowing a credit against the federal individual income tax for state individual income taxes and other state and local taxes of a personal nature paid or accrued;

2. That a graduated plan be used to allow a substantial credit for lower incomes and a smaller credit for larger incomes, for example, about 75 per cent of the aggregate of the credits for taxes on incomes below $10,000 and 25 per cent on incomes above $10,000. The percentages selected should provide a total credit of approximately $150,000,000;

3. That the additional federal revenue to replace the federal credit allowed to taxpayers for state taxes be secured by some one or more of the following:

a. inclusion of dividend income in the federal tax base as completely as other income;

b. amendment of federal and state constitutions to permit the taxation of income from tax-exempt securities and of salaries of officials and employees of the federal, state, and local governments;

c. reduction of personal exemptions and elimination of the earned income credit;

d. allowance of personal exemptions and credits for dependents in terms of tax.

Miscellaneous Short-Run Measures

Four or five other short-run measures submitted by the Council of State Governments or introduced by the delegates were adopted by the Interstate Assembly. Interest in securing detailed information concerning conflicting and overlapping taxes prompted a resolution which was adopted by the Assembly in the following form.

Resolved, That this Assembly memorialize the Congress of the United States requesting the speedy publication of a second edition of the report on Double Taxation of the Ways and Means Subcommittee on Double Taxation and that copies of that report and other reports of the Subcommittee be made available for use of the members of this Interstate Assembly and of the respective state governments and legislatures.

After considerable debate, the Assembly passed a resolution condemning the rider to the Hayden-Cartwright Highway Aid Law which provided for penalizing states that increased their diversion of gasoline and motor registration tax revenues.

Resolved, That the Second Interstate Assembly calls to the attention of Congress and the state legislatures the principle incorporated in Section 12 of the Federal Highway Act of 1934. The Assembly seriously questions the desirability of this form of federal control of state financial and administrative machinery.

In this section Congress undertook to direct the expenditure of state revenues as a condition for receiving federal highway aid. Further diversion of motor vehicle tax or gas tax funds by state governments is in effect prohibited. This provision constitutes an unprecedented federal interference with state fiscal policy.[10]

Two other resolutions, asking for greater legislative and administrative uniformity, especially in the tax field, were adopted by the Assembly without extensive discussion.

III. THE LONG-RANGE MEASURES CONSIDERED

The proposals for long-run improvements in federal-state relationships in taxation concerned three classes of problems: a group of miscellaneous matters dealing principally with tax exemptions and with interstate compacts; a suggestion of needed compilations and research studies; and a definite plan of machinery for continued investigation and conference.

Miscellaneous Proposals

Two resolutions presented from the floor and unanimously adopted by the Second Interstate Assembly were directed against the current practice of exempting from taxation public property and income on public securities. One of these had to do with the comparatively small matter of taxing private property in governmental reservations, while the other was as follows.

WHEREAS, there is an alarming growth in the volume of tax exempt governmental securities; and

WHEREAS, any plan for the alleviation of federal-state conflicts is seriously handicapped by the necessity of higher rates on a narrowed tax base, which in many instances cannot be accurately estimated for budgetary purposes; therefore be it

Resolved, That the Second Interstate Assembly deplores the growing volume of tax-exempt securities and salaries of public officials and employees—federal, state and local—and recommends that these tax exemptions should be removed to broaden the tax base, to secure a more equitable distribution of the tax load, and to promote the use of money in industry rather than to provide an inert refuge for moneyed capital.

At its first meeting the Interstate Commission on Conflicting Taxation tentatively recommended that congress enact a general enabling and consenting act respecting interstate tax compacts. This recommendation, after further study, was proposed in substantially its original form to the Second Interstate Assembly. The Commission admitted by implication that such compacts would probably not be effected in large numbers in the near future, but it expressed the belief that in the long run they would comprise one of the measures necessary for dealing with interstate tax conflicts. After very little debate the following resolution on this subject was passed.

Resolved, That it is the sense of the Second Interstate Assembly that the Congress of the United States should pass a general enabling and consenting act respecting compacts negotiated between two or more states affecting interstate tax conflicts and not affecting the fiscal interest of the Federal Government.

Needed Compilations and Studies

In its report to the Interstate Assembly the Interstate Commission on Conflicting Taxation made the following proposals.

"In developing a long-term program for dealing with federal-state and interstate tax difficulties, the several states can immediately lay the foundation for progress. The first necessity perhaps is the development in each state of more adequate financial statistics of state and local governments. At the present time only about one-fourth of the states makes any pretense of collecting all of the statistics of state and local taxation, and even in these states the statistics are in some cases meager and unsatisfactory. Each state should certainly know the total

10. This section reads as follows:
"SECTION 12. Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time: *Provided,* That in no case shall the provisions of this section operate to deprive any State of more than one-third of the amount to which that State would be entitled under any apportionment hereafter made, for the fiscal year for which the apportionment is made."

amount of tax revenues of various classes which it raises by state or local action. It should know, also, the facts respecting the distribution of its state and local expenditures and those regarding public debt. In addition, it is desirable that the state assemble more complete information regarding functional activities. Incidentally, this recommendation to the states contemplates more generous cooperation with the statistical agencies of the federal government, particularly with the Bureau of the Census.

"In the second place, many of the states need to conduct comprehensive investigations of their own state and local tax problems. A valuable incidental result will be the development of information needed by the Tax Revision Council proposed below. Some of the commonwealths, as for example Connecticut, New York, North Carolina, and others, have already conducted such studies of state and local taxation. More than half of the commonwealths, however, have not recently conducted thorough studies of their tax situations. These states, it is believed, should in the near future provide for official investigations looking toward improvement in the local tax situation and incidentally providing data necessary for any thorough-going interstate investigation.

"Partly as an outcome of these two suggestions and partly as a result of current governmental activity, each state should conduct continuously a campaign of public education regarding state and local taxation. The educational program along this line not only should contemplate popularizing information as to tax problems, but it should also supply the public with full information on governmental expenditures and the administration of public debt."

The Assembly, with no dissenting votes, approved the general plan proposed by the Commission and passed a general resolution to recommend the Commission's proposal to the several states. The resolution, however, went beyond the proposal of the Commission itself by adding, in response to an address by the Research Director of the Commission and another by the Hon. Mark Graves, President of the New York State Tax Commission, the following paragraph.

Resolved, That it is the sense of the Second Interstate Assembly that responsible state officials should consider initiating and advancing their financial statistics and reporting by developing work relief projects designed to bring together a comprehensive picture of state and local revenues. To insure comparative results from such studies, the Assembly requests that the Interstate Commission on Conflicting Taxation provide staff facilities for outlining a general plan for use in each state.

Machinery for Continued Study and Negotiation[11]

Probably the most significant action of the Interstate Assembly, however, was the outgrowth of extensive investigation by the staff[12] and long deliberation by the Commission itself. The need for contact and joint deliberation with federal representatives became apparent to the Commission shortly after its appointment. Also, it was early apparent that, before the long-range work of the Commission could be done, extensive investigation of the allocation of public functions among the various levels of government would be needed.

The Commission pointed out in the course of its report to the Interstate Assembly that certain tax conflicts are very likely to develop in a federal system such as that in the United States. The federal government and each of the state governments have jurisdiction to impose numerous sorts of taxes, and many of the states have made their subdivisions practically autonomous as to financial authority. The results of this constitutional set-up, in conjunction with the recent rapid increase in the necessity for expending tax revenues, has resulted in the chaotic situation which demands attention from federal, state, and local legislative and administrative officials.

The Commission emphasized that, in consequence of the existing situation, some means of conference between official representatives of federal, state, and local governmental units is essential. The problems of taxation are highly controversial, and each level of government must understand as fully as possible the needs of other levels if conflicts are to be reduced. In this connection the Commission directed specific attention to the following statement by President Roosevelt in a letter of February 18 to Senator H. W. Toll, Executive Director of the Assembly.

"It is apparent, I think, to all students of government that there is urgent need for better machinery of cooperation between Federal, State, and local governments in many fields. Both the Congress and the executive departments of the national government are constantly confronted with problems whose solution requires coordinated effort on the part of the States and the Federal government. Two notable instances are the coordination of law enforcement and the interrelation of fields of taxation. This latter question has long seemed to me one of prime importance. Only recently I directed the Secretary of the Treasury to undertake a study of sources of taxation, with particular reference to the matter of conflict or overlapping of Federal, State and local taxation. When this study is complete it should furnish the basis for discussion of the problems involved with representatives of the States.

"I shall follow with the greatest interest the proceedings of the Second Interstate Assembly, with the hope and expectation that many constructive ideas will be developed as to means for perfecting and strengthening the relations between the State governments and the national government in the disposition of the problems in which both States and nation are vitally concerned."

In order to carry out the Commission's plan for providing continuous discussion, the Commission proposed that a permanent Tax Revision Council be created for continual study and conference on the problems of taxation on the one side and the kindred problems of the allocation of governmental functions on the other. The Commission also suggested that the Council might well be made up of seven federal officials, including perhaps three persons from the Treasury Department, and two from each house of congress; seven state officials to be designated as specified by the Interstate Assembly; and seven officials representing local units of government, perhaps one to be appointed by the United States Conference of Mayors, one by the American Municipal Association, one by the International City Managers Association, and one by the Municipal Finance Officers' Association, together with three representatives of rural government to be appointed by the Speaker of the Interstate Assembly. The Commission recommended further that the Tax Revision Council be charged with a thorough-going and continuing study of the reallocation of public functions among different units of government.[13]

(*Continued on page 238*)

11. In providing by resolution for filling vacancies on the Interstate Commission on Conflicting Taxation, the Assembly made the Commission's status more definite.

12. *To the Interstate Commission on Conflicting Taxation Worth Its Salt?*, March, 1933; *Fiscal Coordination through Intergovernmental Agreement*, November, 1933.

13. The Commission explicitly recognized the need for different staff facilities for this type of work, but emphasized the interrelation between the problems of tax conflict and the problems of assigning governmental functions.

OLIVER WENDELL HOLMES: SCIENTIST

By Walter Wheeler Cook
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THE intellectual debt which the present writer owes to Mr. Justice Holmes is so great that he has been unable to resist accepting the invitation of the Editor to prepare for publication in this number of the JOURNAL a brief tribute, even though the short time available for its preparation will necessarily prevent doing more than hint at one or two of the many aspects of his personality. The title I have chosen will reveal the point of view from which what follows is written.

In an address to the Bar Association of Boston in 1900 Mr. Justice Holmes in describing briefly his own intellectual development said: "One begins with a search for a general point of view. After a time he finds one, and then for a while he is absorbed in testing it, in trying to satisfy himself whether it is true. But after many experiments . . . his theory is confirmed and settled in his mind."[1] Since Mr. Justice Holmes's death I have been turning over in my mind his entire career so far as I know it, especially as revealed in his opinions as a judge and his writings as a legal historian and student of legal theory. As a result I have been confirmed in a belief formed long ago as to how his "general point of view" may most aptly and accurately be characterized, so far as that can be done by a single label. In his case the task is less difficult than with most persons, for one has before him a harmonious and well integrated personality. The point of view which, it seems to me, gave a unity to all that he said and did, is summed up in the following passage from his dissenting opinion in Abrams v. United States,[2] dealing with the problem of freedom of speech under the Constitution:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Consider the implications, the fundamental assumptions, underlying this paragraph, especially the words, "All life is an experiment." Are not these implications and assumptions essentially identical with those of every true scientist, of every believer in the application of the scientific habit of thought in all fields of human endeavor? So, at any rate, it seems to me, and it is in the light of this hypothesis that I write this brief tribute to the memory of one from whom I have learned so much.

Mr. Justice Holmes was often classed as a liberal, and so read the headlines the day he died. Anyone who reads his views as to desirable economic organization, as expressed, for example, in the letter printed in his Collected Papers under the title "Economic Elements,"[3] will see quite clearly that from this point of view he was a conservative and believed in the essential soundness of the capitalist system. How explain, then, his reputation as a liberal, or the fact that in a conversation with the present writer an eminent New England lawyer denounced Holmes as a socialist? The answer, I think, is as follows:

Believing, as he did, that all life is an experiment, and taking the essentially scientific view that much of the accepted truth of today will be antiquated tomorrow and discarded for a newer and different truth—one has only to glance hastily at the scientific world today to discover this[4]—Mr. Justice Holmes realized that his own view of desirable social and economic organization might well be mistaken. Accordingly he recognized the desirability of allowing a free hand for social experimentation if the community desired to try it. He realized that, after all, the orthodox views of today were once upon a time new and heretical, and that the only way to learn whether a new social or economic doctrine would work was to give it a trial. This point of view leads straight to his long series of decisions and opinions, some of them as a dissenting member of the Court, upholding as constitutional all kinds of laws which provided for social and economic experimentation. If the people in one state wanted to try the experiment of getting along without injunctions in labor disputes; if in another state they desired to treat the manufacturing of ice as a public utility subject to regulation by the state; if in still another state the majority speaking through the legislature concluded to try the experiment of limiting the hours of work of bakers; or if Congress wished to experiment by fixing minimum wages for women in the District of Columbia—and so on for dozens of other social and economic experiments—his fundamental philosophy led him to uphold the experiments as constitutional. This he did, irrespective of the question whether he thought the experiments in question wise or foolish: he was too scientific in his attitude to assume that as a judge it was his task to interpret ambiguous phrases in the Constitution like "due process of

1. Collected Papers of Oliver Wendell Holmes, 246.
2. 250 U.S. 616.
3. Collected Papers, 279.
4. "It will not be very long before in our turn we shall have become the ancients; and our precious knowledge, very likely, in its turn, merely another set of opinions, partly, perhaps, invalidated." Frederick Barry (1907) The Scientific Habit of Thought, 140.

law" so as to prevent experimentation in the "insulated chambers" of the states. The eminent New England lawyer referred to merely made the mistake of assuming that if Mr. Justice Holmes upheld a law as constitutional he must approve it as wise or expedient. Doubtless in the case of many judges this would have been a reasonable conclusion; indeed in the case of the New England lawyer himself I suspect that it would have been almost a necessary conclusion; but in the case of Mr. Justice Holmes nothing could have been more erroneous.

It is, then, almost entirely from his long line of opinions upholding the constitutionality of many and diverse laws providing for new and hitherto untried social and economic experiments that his reputation as a liberal arises. In that sense he was "liberal", i.e. tolerant of views which differed from his own, willing to live and let live, and a believer in the "free trade in ideas", which is the essential condition for all truly scientific work. The point I am making will perhaps be clearer if we compare the "liberalism" of Mr. Justice Holmes with that of his brother Brandeis. Note how carefully the latter's opinions sustaining the constitutionality of some new piece of legislation are as a rule documented so as to show the need or desirability of the legislation in question. Compare this with the total absence of such documentation in Mr. Justice Holmes's opinions. Without doubt Mr. Justice Brandeis's type of opinion as a method of persuading his legal brethren to adopt his view that the statute in question is constitutional is more likely to be effective than the undocumented opinions of Mr. Justice Holmes. From Holmes's point of view, if I am not mistaken, all such documentation was unimportant and indeed largely irrelevant in determining the constitutional questions involved. That is to say, as he saw the problem— again, unless I am mistaken—in order to determine the constitutional question it was not necessary to know that the legislation under scrutiny was needed or socially desirable, but merely that reasonable people might think it so, in which event their constitutional right to try the experiment seemed to him clear.

Let us turn to another aspect of his work. I have heard it stated by an eminent student of the law that Mr. Justice Holmes had improperly divorced law and morals, and taken the cynical position that law ought to be considered without regard to ethics. Here again, I think it will be found, his essentially scientific point of view underlay what he wrote about the matter. One needs to keep it in mind when one reads what he wrote and interpret accordingly. Consider the following passage:

"The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the arguments, and so to drop into fallacy."[5]

It is passages such as these, when taken from their context and interpreted *in vacuo*, so to speak, which have given rise to misunderstanding of Holmes's position. Putting the above passage back into its context, we find that on the preceding page he cautioned his hearers by prefacing his remarks as follows:

"I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things."[6]

Precisely so: if one would study law like a scientist, he must for certain purposes—note the limiting phrase—isolate it and study it *as a system*. On the preceding page he had outlined precisely what he meant, stating that the "primary rights and duties with which jurisprudence busies itself are nothing but prophecies," and that when one speaks of a "legal duty" he must not be misled by the word "duty", a term borrowed from ethics, into thinking more is meant than "a prediction that if a man does or omits certain things he will be made to suffer in this way or that by the judgment of the court." To be noted is that farther on in the same paper he goes on to point out that the law is not a closed system which "can be worked out like mathematics," and urges the desirability of a more conscious recognition by the judges that it is "their duty" to "weigh considerations of social advantage"[7]: surely a clear enough recognition of the relation of ethics to law.

In a letter addressed to the present writer Mr. Justice Holmes expressed somewhat the same idea when he wrote: "To know law one must be cynical and disregard ethics that find no legal expression." Here again the limiting phrase must be noted. It is not ethics in general that are to be disregarded, but merely "ethics that find no legal expression." It will perhaps be instructive to consider the context in which the foregoing passage was written. Mr. Justice Holmes and the present writer had been corresponding concerning the meaning of the statement in his book on The Common Law that a "contractor is free to break his contract." This statement has aroused much discussion, usually adverse, and, I take it, much misunderstanding. It will be illuminating to give Holmes's own explanation of it. In one letter he wrote about the matter he explained that all he meant was "that the law did not interfere with him [the contractor] before he broke it [the contract]." In response to a suggestion that this was not entirely clear, he wrote: "I agree that in one sense it is not desirable to express the position of a contractor as I expressed it. Of course it is not the theory of the Common law that he has an option. I dare say that it even might be proper to describe a breach as illegal. Although early in my legal studies I was perplexed to discover the difference between illegality and conduct that merely was taxed or had to be paid for, I asked myself what is the difference between the Mill acts and conversion, for which latter as in the former case you sim-

5. Collected Papers 171.

6. Ibid., 170.
7. Ibid., 180.

ply have to pay the value of the thing taken. To know law one must be cynical and disregard ethics that find no legal expression. The only legal differences that I could discover were that a contract to do the act called illegal was void and that there was no contribution between wrongdoers. The reason that I thought and still think my mode of statement useful (though the majority of the profession no doubt would view it with repugnance) is that no contract depends for its performance solely on the will of the contractor and that apart from special objections to wagers a man may contract for a future event that is wholly outside of his power but the non-occurrence of which will be a breach, none the less. . . I say that at Common Law a contractor simply is taking the risk of a future event."

To be considered in this connection is the following passage from his essay upon The Path of the Law:

"Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."

At the risk of substituting my own version for that of Mr. Justice Holmes, I venture to state as follows what, it seems to me, his theory was: Aside from cases in which we decide to order specific enforcement of a contractual duty, the law has left a contractor "free" to violate the "duty," in the sense that the only penalty for not performing the "duty" is that he must pay damages.[8] If we ask why the law has left him "free," the answer is, on grounds of policy. In the specific performance cases we do not leave him free: also a decision on grounds of policy. If the contractor "breaks the contract" by refusing to perform, we must not suppose that the "duty" to perform still exists. That it does not and that the other party has left no more than a (secondary) right to damages is shown by the existence of the so-called "duty to mitigate damages." That is to say, the other party can not recover in his action for breach of contract items of damage accruing after the breach and arising from treating the (primary) duty to perform as still in existence.[9]

Whether Mr. Justice Holmes's view is right or wrong I am not concerned at the moment to establish, but rather to call attention to how it was reached, namely, in a manner truly scientific: Careful observation of the data, that is to say, of the phenomena of judicial decision as they occurred; the elimination of the irrelevant, such as ethics which had found no expression in the law, and which one might read into the law unless he used adequate analytical tools in the shape of carefully defined concepts of legal right, legal duty, primary right, etc., etc. Here we may recall Mr. Justice Holmes's remark: "I have in mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes."[10]

This last quotation brings me to the only other aspect of Mr. Justice Holmes's work which I have time to mention, one which also supports my analysis. I refer to his belief in the value of the study of legal theory, of jurisprudence. Let me first quote and then comment.

"There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules. . . . If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. . . . The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price. . . . The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote."[11]

I have said that after quoting I would comment. But is comment necessary? I think not, for obviously here speaks a true scientist. Was it not one of the things which distinguished Holmes from most of his colleagues and made him stand preeminent among them, that his adequate equipment in the field of "theory" and jurisprudence enabled him to "look through all the dramatic incidents and discern the true basis for prophecy?"

In closing this brief and inadequate tribute to the memory of the great master of the law who has left us, the present writer ventures to make a suggestion which he believes will commend itself to the members of the legal profession, namely, that Congress be asked to set aside the gift to the Government made by Mr. Justice Holmes as endowment for the Oliver Wendell Holmes Chair in Research Jurisprudence in the Library of Congress.[12] There could be no more fitting or appropriate memorial of one who has contributed so greatly to the growing edifice of our legal system.

8. It is obviously Holmes's use of this word "free" which has caused the misunderstanding. Speaking orally he once said to me in substance: "All I meant by that is that no coercion will be used to make him perform specifically, except in so far as the subsequent payment of damages tends to induce performance." Of course he is not legally "free" in the sense that there is no legal "duty."

9. I developed this idea some years ago in a note in 32 Yale Law Journal 380 (1923), discussing a case in which the analysis became of great practical importance in determining whether the result reached by the majority or the minority was to be preferred. The case was Hong Hoon v. Lum Wai (1922) 26 Haw. 541.

10. Collected Papers, 196.

11. Collected Papers, 195-201.

12. The present writer has already mentioned this idea to persons connected with the Government in the hope that appropriate action will be taken to put the suggestion before Congress.

THE NEED FOR A FEDERAL CHILD LABOR AMENDMENT

By Charles C. Burlingham

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THE Federal Child Labor Amendment is a simple measure designed to do exactly what its wording implies: to give Congress "power to limit, regulate and prohibit the labor of persons under 18 years of age."

The need for federal control of child labor has long been recognized. As early as 1907 the late Senator Albert J. Beveridge proposed in Congress a federal child labor law, but it was not until 1916 that such a law was passed, based upon the power to regulate interstate commerce. Following a 5 to 4 decision of the United States Supreme Court declaring this law unconstitutional, a second federal law, based on the taxing power, was passed in 1919. This law was declared unconstitutional in 1922. It then seemed clear that if there were to be federal control of child labor, an amendment to the Constitution granting Congress specific authority to legislate was necessary. Such an amendment was passed by Congress in 1924 and sent to the states for ratification. To date 24 states have ratified.

There are two questions to be considered with regard to this Amendment: (1) Is federal regulation of child labor still needed and (2) If it is needed, is the proposed Amendment properly drawn as a grant of power to Congress to legislate on child labor?

The Need for Federal Regulation

Failure of State Legislation

For more than a century we have relied upon state legislation to protect children from the hazards of industry. State legislation has failed. Even today 9 states through exemptions in their child labor laws permit children under 14 years to work in factories; 8 states permit children between 14 and 16 years to work 9 to 11 hours a day; 11 states allow such children to work until 8 p. m. or later; 34 states have practically no regulation of the employment in hazardous occupations of 16- and 17-year-old boys and girls.

The inadequacy and widely divergent standards of state child labor legislation are reflected in child labor conditions. Between 1920 and 1930, the number of children 15 years and under employed in the textile industry in the United States decreased 59 per cent. But in contrast with this decrease for the country as a whole, two important textile states—South Carolina and Georgia—reported 20 per cent more children employed in textile mills in 1930 than in 1920.[1] In these two states children may work for 10 hours a day, 6 days a week.

It was such conditions which led Joseph B. Ely, then Governor of Massachusetts, to say in the fall of 1932 that unless the southern states raised their labor standards for women and children Massachusetts would be obliged to lower its standards to meet southern competition.

1. United States Census 1930.

In the North the southern textile mills had their counterpart in the sweatshops which sprang up during the early years of the depression. Children were an important element in the cheap labor supply on which sweatshops flourished. Studies in Connecticut[2] and Pennsylvania[3] revealed that in some clothing factories 20 per cent of the workers were 14- and 15-year-old children.

The median average weekly earnings of 14- and 15-year-old children in Pennsylvania for a full week's work was $3.31. The Pennsylvania Department of Labor further reports that although the total number of working children decreased during the depression period, the decrease was not marked as compared with the general reduction in employment for all workers. "In 1931 when adult workers were losing their jobs at a stupendous rate more 14- and 15-year-old children were employed in some sections of the state than ever before."

Faced with the spectacle of children working while millions of adults were unemployed, those interested in child labor made a determined effort in the early months of 1933 to improve state child labor standards. Bills to raise to 16 years the minimum age for full-time employment were introduced in 11 states—and were rejected in 9. Each state feared to take the step alone and thus subject its industries to competition with states which still permitted the employment of "cheap" child labor.

Success of Federal Control

In sharp contrast with the failure of state legislation is the success of federal control through the child labor provisions of the temporary NRA codes. With a few exceptions, such as the newspaper code, the industrial codes establish a 16-year age minimum for employment with a limited amount of work outside of school hours permitted at 14 years in some industries, such as the retail trades; most codes specify also an 18-year age minimum for hazardous processes in the industry. These provisions establishing child labor regulation on a national uniform basis were unanimously acclaimed, even in those states which but a few months before had rejected state legislation to achieve the same end.

The child labor provisions of the codes have been enforced. For the time being children have been removed from major industries. The Pennsylvania Department of Labor and Industry in 1934 made a survey of the cotton garment industry under the NRA. "Only two children under 16 years were found at work out of 12,000 employees; and this is

2. "The Employment of Women in the Sewing Trades of Connecticut," United States Department of Labor, Bulletin of the Women's Bureau, No. 97, 1932. P. 9.

3. "Labor and Industry in the Depression: A Review of the Four-Year Period, 1931-1934, and Its Effect upon Worker and Employer, as Encountered in the Department of Labor and Industry's Administration of the State Labor Laws," Department of Labor and Industry, Pennsylvania. Special Bulletin No. 39, 1934. Pp. 58-59.

an industry where one worker in every 25 was under 16 years of age in 1932."[4]

This experience in Pennsylvania is typical of what has been happening all over the country. During the last four months of 1933 not a single work permit for industrial employment was issued to a child under 16 years in the entire state of Alabama, or in 27 cities including Fall River and New Bedford, Massachusetts, Jersey City, Hoboken, and Camden, New Jersey, Buffalo, New York, and Allentown, Pennsylvania, the city where only a few months before hundreds of "baby shirt-workers" had gone on strike. In the 10 states and 62 cities in other states reporting to the Children's Bureau only 3,193 work permits had been issued, mostly for domestic work.[5]

The failure of state legislation and the success of federal control show conclusively the need for permanent federal legislation. With the end of the NRA codes, many of which Mr. Richberg has already recommended for scrapping, cheap child labor will return. The Federal Child Labor Amendment would enable Congress to incorporate in a permanent law the child labor standards which were successfully enforced through the NRA codes.

IS THE PROPOSED AMENDMENT PROPERLY DRAWN AS A GRANT OF POWER TO CONGRESS TO LEGISLATE ON CHILD LABOR?

History of Amendment and Passage in Congress

Opponents of the Amendment have made much of the fact that 23 different suggestions for its wording were made in Congress and not accepted. The truth is that after the second federal child labor law was declared unconstitutional, so great was the demand for federal legislation, 40 different amendments were offered in Congress by Senators and Representatives from 14 states.

The proposed Amendment was the result of months of deliberation. A lay committee composed of representatives of more than 20 national organizations interested in child labor prepared the original draft. Mr. Gompers served as Chairman and other members included Monsignor, then Father, John A. Ryan of the Catholic University of America, Dr. Worth M. Tippy, of the Federal Council of Churches, the President of the National League of Women Voters, representatives of the National Child Labor Committee, the National Consumers' League and other organizations. This lay committee consulted distinguished constitutional lawyers including Roscoe Pound, Dean of the Harvard University Law School, Newton D. Baker, Professor Ernst Freund of the University of Chicago Law School, and Professor Joseph P. Chamberlain of Columbia University Law School.

After many conferences between the legal advisers of this lay committee and the lawyer members of the Senate Judiciary Committee, which included George Wharton Pepper of Pennsylvania, the late Thomas J. Walsh of Montana, and Samuel Shortridge of California, the wording of the Amendment was agreed upon. The final draft was primarily the work of Senators Pepper and Walsh.[6]

The Amendment passed the House by a vote of 297 to 69 and the Senate by 61 to 23. Among those who supported it were President Coolidge, the late Henry Cabot Lodge, Republican leader of the Senate in 1924, his successor Charles C. Curtis, Joseph T. Robinson, Democratic Senate leader, Nicholas Longworth, Republican floor leader, and William A. Oldfield, Democratic whip.

Choice of Words Used

Every word used in the Amendment and every suggestion for modification were thoroughly considered. It was the consensus of opinion that "since the Amendment is a grant of power to Congress it should be generally and broadly inclusive in its terms. What occupations a statute would include, what age and hour regulations would be adopted, would be for Congress to determine from time to time, in the light of what it finds is for the welfare of children."[7]

The report of the American Bar Association condemns the Amendment because it uses the phrase "persons under 18 years of age" instead of "children." The reason for this is stated clearly in the report of the Senate Judiciary Committee recommending passage of the Amendment:[8]

"An age limit is declared. It unquestionably would have been simpler to have provided for the regulation and prohibition of the labor of children and to have stopped there. But your committee became convinced that in asking for this it might fail utterly. A marked difference of opinion was developed at the hearings before the subcommittee, it being argued on the one hand that after 18 years of age, girls and boys had passed the period of dependency and were physically and mentally capable of fending for themselves so that the power to protect them which was sought by the amendment could safely be limited to the indicated age; while on the other hand it was argued that many cases and classes merited protection after the age fixed, and that as the State's police power embraced the protection of its children during the period of their nonage and up to the instant of their majorities it was reasonable to ask that identical police power be conferred on the National Government.

"Reason is found in both points of view. But your committee finally concluded to insert the 18-year limitation; because such limitation would certainly embrace the vast majority of cases calling for protection and remedial legislation, while the exceptional cases calling for legislation after that age might arise in one State and not in another and therefore might safely be left to the wisdom of each State.

"And, finally, in contemplation of the opposition which almost certainly would arise should the word 'child' be used, and having in mind the common-law definition of the word 'child' and the many decisions of courts as to the legal meaning of the word, it was thought expedient to ask for that which would accomplish the greatest good while being subject to the least opposition. In order to remove all doubt as to the power to be delegated, it was thought wise to use the word 'persons.'"

The reason for granting power up to 18, instead of 16, years was to enable Congress to regulate the employment of older boys and girls in especially hazardous occupations. Every state now has this

4. Ibid. P. 65.
5. United States Department of Labor, Children's Bureau, Washington, D. C. Press release April 6, 1934.
6. For complete history of drafting of the Amendment see "Proposed Child Labor Amendment to the Constitution"—Speech by Hon. Edward P. Costigan of Colorado in the Senate of the United States, February 8, 1935. *Congressional Record*. 74th Congress, 1st Session.
7. Report of House Committee on the Judiciary to accompany H. J. Res. 184 (68th Congress, 1st Session, March 26, 1924), p. 21.
8. Report of Senate Committee on the Judiciary to accompany S. J. Res. 1 (68th Congress, 1st Session, April,, 1924), pp. 18-19.

power, but few state child labor laws have special provisions regarding hazardous work for this age group. The NRA codes have recognized this principle and while fixing 16 years as the general minimum age for employment specify 18 years for work in hazardous processes.

Objection has also been raised to the use of the word "labor" instead of "employment." This also was thoroughly considered by the Senate and House Committees in 1924. There are many pages of testimony on the point. The Senate report states:[9] "It seemed wise to adopt the word 'labor' in lieu of the suggested word 'employment.' The former word expresses precisely the matter of the proposed amendment. It is the use of the labor rather than the matter of its employment which is of direct concern, and to state it thus avoids all possibility of the shufflings and evasions which might follow the adoption of the latter word."

Any one familiar with the administration of state child labor laws knows the evasions which occur when the word employment alone is used. In industrial home work, in the beet fields, frequently in canneries children who work are not employed in the technical sense of the term. In the beet fields the father of a family contracts to cultivate a specified number of acres and the acreage is determined largely by the number of children in his family. The children are not employed, but they labor from sun-up to sun-down. In canneries and other establishments where pay is on a piece work basis the children frequently work with their parents, adding the products of their labor to that of their parents rather than working as individuals and being paid for their own output.

Testifying on this point before the Senate Committee, Miss Grace Abbott, then Chief of the Federal Children's Bureau, said:[10] "I was also in doubt about the word 'employment,' which we had had considerable difficulty about in the State legislation, because especially on piece work the children often work with their parents, and are not on the pay roll, and are not held to be employed, and we feel that it is a dangerous word to use, as far as the protection of children is concerned, on that account." Miss Abbott further testified that "most of the States have finally resorted to 'employed or permitted to work,' or language of that sort."

The report of the Committee of the American Bar Association[11] gives a very erroneous impression of Miss Abbott's testimony by omitting certain phrases from the passage quoted:[12]

NATURE OF OPPOSITION

Manufacturers

Those who appeared before the Congressional Committees in 1923 and 1924 in opposition to the measure included:

James A. Emery, Counsel for the National Association of Manufacturers;

Louis A. Coolidge, Chairman of the Sentinels of the Republic;

David Clark, Editor of the *Southern Textile Bulletin;*

Mrs. Mary G. Kilbreth, former editor of *The Woman Patriot,* who opposed the Woman Suffrage Amendment, the establishment of the Federal Children's Bureau and the Infancy and Maternity Act;

Henry W. Moore, officially representing the Pennsylvania Manufacturers' Association.

Simon Miller, textile and garment manufacturer of Pennsylvania.

The National Association of Manufacturers and the southern textile group both claim the honor for the defeat of the Amendment when it first came before the states in 1924 and 1925. The President of the former organization stated in an address before the Annual Convention of his Association in 1926 that the National Association of Manufacturers had defeated the Child Labor Amendment. The *Southern Textile Bulletin* asserts that David Clark "personally conducted the successful campaigns against the two Federal Child Labor Laws and the proposed Child Labor Amendment."

In this year's campaign for ratification the same groups are aligned against the Amendment.

Mr. C. L. Bardo, President of the National Association of Manufacturers, in the March issue of *The Rotarian* tries to minimize the extent of the child labor evil; the Tennessee Manufacturers' Association sends a letter to its members congratulating them on their help in defeating the Amendment; the Georgia State Manufacturers' Association is represented at the hearing in that State; the *Southern Textile Bulletin* tells its readers how it helped defeat the Amendment in Nevada; anonymous circulars mailed from Charlotte, North Carolina (home of David Clark and the *Southern Textile Bulletin*) to Nebraska depict the Amendment as an insidious attempt to control the work children do for their parents at home; in New York a representative of the State Economic Council pleads for "the God-given right of children to toil."

Farm Groups

Many farm groups now oppose the Amendment, although when first proposed in Congress the National Grange supported it.[13] It is not without significance that the flood of propaganda to persuade the rural population that the Amendment is aimed at work on the home farm was started in 1925 immediately after the first few states had ratified—all agricultural states. The Farmers' States Rights League which issued much of this material was found to be, not a farm organization at all, but a tool of certain southern textile interests.[14]

The Memphis Press-Scimitar (Feb. 9, 1935), commenting upon the defeat of the Amendment in Tennessee, says: "What pretense to say that the opposition to the Child Labor Amendment came from those who feared that Congress might forbid children to assist their parents on farms and in homes! The opposition came from manufacturers, who do not want to be prevented from hiring cheap child labor in preference to more expensive adult labor."

Newspapers

Most of the newspapers of the country have deliberately presented a one-sided picture of the Amendment. The opposition of the press arose after protest was made against the child labor provisions proposed for the newspaper code which would have permitted boys or girls of any age no matter how

9. Ibid.
10. Ibid. P. 39.
11. "The Federal Child Labor Amendment" by the Special Committee of the American Bar Association. AMERICAN BAR ASSOCIATION JOURNAL, January, 1935, p. 15.
12. See "In Answer to the American Bar Association Committee on the Federal Child Labor Amendment." Non-Partisan Committee for Ratification of the Federal Child Labor Amendment. 1935.
13. Report of House Committee on the Judiciary to accompany H. J. Res. 184 (68th Congress, 1st Session, March 28, 1924), p. 252.
14. See *Congressional Record,* February 17, 1925, p. 4105.

young to sell and deliver newspapers at any hour of the day or night except during school hours. The papers refused to accept a substitute provision fixing a 14-year age minimum (with carrier work permitted at 12 years) and forbidding work under 16 years before 6 a. m.

Immediately an organized attack was launched against the Child Labor Amendment, alleging that it would prevent a child under 18 years from engaging in any form of work, including the sale and delivery of newspapers.

The American Newspaper Publishers' Association and International Circulation Managers' Association have gone on record against the Amendment and have flooded the papers of the country with material against it. More than 70 newspapers which were in favor of the Amendment in 1933, before the question of regulating the use of newsboys arose under the code, have turned against it editorially since then. No argument has been too absurd to be given editorial credence. Nor has the organized campaign of the newspapers against the Amendment been limited to expression of editorial opinion.

Catholic Opposition

The Amendment is opposed also by some who ordinarily would welcome any measure to eliminate child labor. At the hearings in Congress on the Child Labor Amendment no Catholic opposition was expressed. On the contrary, the Amendment was warmly endorsed by Monsignor Ryan, Mrs. Agnes G. Regan, Executive Secretary of the National Council of Catholic Women, and Father R. A. McGowan, President of the National Catholic Welfare Council. Now, however, except for a few outstanding spokesmen such as Monsignor Ryan, Father Haas and Father Kerby, many Catholics oppose the Amendment on the ground that it might lead to federal regulation of education and even the abolition of Catholic and other religious schools.[15]

The argument is without legal basis, and has been effectively answered,[16] but the opposition continues. In some states the Catholic atitude has been the decisive factor in action on the Amendment.

Opposition to the Amendment cannot be taken at its face value. Investigation discloses that the opposition of various groups is frequently inspired by the same persons. And these persons, however strongly they may declare themselves in favor of state legislation, are often found to have opposed such legislation. Manufacturers and their lobbyists are glad to hide behind farmers and churchmen.

Nor should we be affected by high-sounding names. The National Committee for the Protection of Child, Family, School and Church was organized in 1934, as it admits, for the sole purpose of defeating the Child Labor Amendment. Its Executive Committee interlocks with the Sentinels of the Republic, an organization founded in 1922 by the late Louis A. Coolidge, Treasurer of the United Shoe Machinery Company, who at the Senate hearings stated his opposition to the Woman Suffrage Amendment and federal income taxes, as well as to the Child Labor Amendment.

At a recent hearing before the Judiciary Committees of the New York Legislature, Mayor LaGuardia hit the nail on the head when he said: "It is not the constitutionality of the Amendment which is being opposed; it is its economics."

15. Thus in New York *The Evangelist*, Diocesan paper of Albany, stated (Feb. 22, 1935): ". . . the New York State Catholic Welfare Committee, which represents an expression of the united opinion of the Bishops of New York State on all questions involving the interests of the Church, her people and her institutions, definitely went on record opposing the proposed resolution of ratification. This opposition was expressed in a memorandum filed at a joint hearing on the question of ratification before the Judiciary Committees of the Senate and Assembly of the Legislature of New York State, held January 23, 1935.

"The position of every Catholic in this State should be evident. The Bishops, our divinely appointed leaders, have spoken. We need look no further. . . ."

16. "The Federal Child Labor Amendment" by George Z. Medalie. Radio talk delivered over WEAF and NBC network Feb. 11, 1935, under the auspices of the National Child Labor Committee.

MORTGAGES UNDER TITLE II OF THE NATIONAL HOUSING ACT

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UNLIKE Title I of the National Housing Act, which provides for personal credit loans for the purpose of making repairs, the provisions of Title II are not specially intended for the purpose of producing an immediate effect upon the building trades and allied business. As the stagnancy of these industries was deemed to be the greatest single factor in retarding general recovery, the Federal Housing Administration turned its attention first to Title I, which was intended to produce prompt stimulation, and to getting this part of the Act well under way before taking up the necessarily complicated task of beginning operations under Title II, the effect of which, although designed to stimulate new home construction, could not be felt in the building trades so quickly.

However, the point has been reached where this task has been reasonably accomplished and the administration is now fully prepared with regulations, forms and general modus operandi for the making and insuring of mortgages.

The provisions of this title relate strictly to mortgage financing and refinancing of homes, and it is intended not only to accomplish the mere providing of funds, but also to offer the aid and resources of the federal government towards establishing sounder methods, not only of financing but also of home construction and the development of new areas of homes under such restrictions that these developments shall be made along lines and under conditions which will insure both improved living conditions and financial success.

The Administration believes that in home financing the system of short term first and second mortgages is outworn, and it proposes to substitute the new form of a single mortgage amortized over a long term, the

ultimate goal being the ownership of the home free and clear.

From the standpoint of the lender, the amortized mortgages are not attractive to individual investors. This fact has been recognized and the lending under them has therefore been confined to substantial institutions.

Title II creates insured mortgages, the guarantee against loss to be supported by premiums collected by the Federal Housing Administrator, but also backed by governmental guarantee against loss to some extent if the premiums fixed by the law should be inadequate. A complete system of what is in effect a mutual insurance project is created along approved lines, and it is believed that the premiums fixed will more than cover the risks assumed.

There is added to the security of the property alone the personal credit of the borrower, that is to say, the security must not only be an adequate value of real property, but an approved mortgagor, whose resources, at least at present, indicate an ability to pay the instalments.

The task of working out regulations and forms for the making and insuring of these mortgages was laborious, and it has been unavoidable that it has resulted in what appears to be very complicated regulations. It is the purpose of this article to explain the method of operation as simply as possible, and at least to put before the borrower and lender sufficient information to enable them to decide whether they may reasonably expect to qualify loans which are under consideration.

These mortgages may be made to refinance existing mortgages, both by the owner and by what the regulations call the "Operative Builder" who is none other than a limited edition of our old friend the speculative builder. The loans may also be made for financing new developments.

The general requirements for all loans, for whatever purpose made, are as follows:

Insured loans can only be made by mortgagees who have first been approved by the FHA. These mortgagees are limited to corporate institutions subject to supervision by the governmental agency from which their charters are derived, having an unimpaired capital and surplus of not less than $100,000, $50,000 of which must be unimpaired capital, and situated in a city, town, county seat or other urban centre of not less than 6,000 population. The principal activity of the institution in the mortgage field must be the lending of its own funds. The approval of a mortgagor is general, and continues for all mortgages made until withdrawn. Withdrawal of approval does not affect mortgages already made, but only stops insurance of subsequent loans.

Each mortgage must not exceed $16,000 and must be a first lien not exceeding 80% of the appraised value of the property and there must be no subordinate liens at the time of its execution.

Both bond and mortgage must be made upon the forms approved and provided by the Federal Housing Administration.

The mortgage must be upon a dwelling for not more than four families. The mortgagor need not live in the property and the same mortgagor may obtain loans upon as many pieces of property as his credit standing will permit.

The most important requirement is that the dwelling, either already built or to be built, must conform to the standards fixed by the FHA as to construction and appropriateness to the neighborhood. These requirements are enumerated in Circular No. 2 entitled "Property Standards" issued by the FHA. It is impossible to cover all the contents of this circular, but it is absolutely necessary to consult it before any conclusion as to the eligibility of a proposed loan can be reached. All that can be said here is that the construction standards set up are only moderate, and are now attained in all good housing construction. They present no difficulties whatever in the case of new building, and in the case of existing buildings, of which these rules may disqualify a certain percentage, the extent of this disqualification corresponds very closely to a lack of value as a mortgage risk.

The theory of the amortized payments required in these mortgages is that they shall, in addition to monthly reduction of principal and payment of interest, also secure payment in monthly instalments of all carrying charges. The monthly payment must consist, therefore, of an equal instalment of principal, interest to date, monthly instalments of the premium for insuring the mortgages, of the taxes, fire insurance premiums and service charges. The taxes and premiums are to be paid by the mortgagee out of the amount so received.

All of these mortgages are to be for long terms. The term, not to exceed twenty years, may be fixed by the FHA according to the existing circumstances involving considerations of the credit standing of the applicant, and the permanence of the neighborhood. These, of course, are variable in every case. On account of this new feature, the long term, certain questions will occur to prospective borrowers and lenders as to the future history of the property and the mortgage. The mortgagee will ask whether the mortgage can be sold, and the borrower will have the problem of whether he is to remain liable on the bond for the many years of the term fixed, if he should sell the property.

The regulations take care of the lender's question. They provide (Circular No. 1, Article XII) that if the holder of the mortgage sells it, the insurance ceases unless it is sold to another institution which is an approved mortgagor. The same thing happens if the mortgagee disposes of any share or interest in the mortgage, whether by sale of certificates or otherwise. This naturally limits the market, and entirely disposes of the possibility of issuing the usual mortgage certificates on one or a group of these mortgages.

A mortgagee who sells an insured mortgage may still service it.

As to the mortgagor, his legal position is, of course, no different from that in which he finds himself when he signs the bond on a short term mortgage. In both cases he remains liable until the mortgage is paid. However, in the case of the insured mortgages, he has an opportunity to secure his release from this liability upon a sale of the property. If he succeeds in finding a purchaser who can qualify in credit requirements, the mortgage can be refinanced by a new insured mortgage. On the other hand, if he chooses to sell to a purchaser who has poor credit, he will have to take the usual chance which exists in this respect on sales of property subject to short term mortgages.

The borrower, under an FHA insured mortgage, is in a better position in this respect than the mort-

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gagor under a mortgage issued by the Home Owners' Loan Corporation, from which there is no way of obtaining a release until the mortgage is paid, there being no possibility of substitution of another HOLC mortgage by the purchaser.

At the present time the making of the Title II mortgages is considerably hampered by state laws which do not permit many of the eligible institutions to make loans as high as 80% of the appraised value. It is expected that in the near future appropriate legislation will correct this situation.

The advantage of these investments to institutions is very easily appreciated. The mortgages are a security of practically the same class as a government bond, and compensate for the extra trouble of placing and servicing by a higher return.

Interest rates, insurance premiums and servicing charges have been fixed by the Federal Housing Administrator in a schedule which is contained in Article V of the regulation (Circular No. 1). This schedule has proved to be rather difficult to understand.

The interest rate varies from 5 to 5½%. The latter rate prevails in all cases of refunding mortgages on dwellings constructed before June 27, 1934. In all other cases it is 5%.

The service charge is ½% in all cases except where either the mortgage is taken on a sale by the mortgagee to the mortgagor of property constructed before June 27, 1934, or where the transaction is the refunding of a mortgage to the same mortgagee on property constructed before the above date. In these two excepted cases no service charge is allowed.

The mortgage insurance premium is 1% in all cases where the interest rate is 5½%, and ½% in all other cases.

The above percentages for interest and servicing are both calculated on the amount of the monthly balance of principal unpaid, but the insurance premiums are calculated upon the original principal of the mortgage.

The expression "constructed after June 27, 1934," means property upon which at least 60% of the appraised value of the improvements represents buildings or parts of buildings constructed since said date.

Considering next the case of the "Operative Builder," who is really the speculative builder, that is one who builds dwellings for the purpose of selling them, additional questions naturally arise. These are very well covered in Circular No. 4.

The first point to be noted is that each dwelling must be separately financed and there can be no such thing as a blanket mortgage or similar arrangement.

Secondly, these mortgages cannot be made as building loans and therefore the builder must be prepared to obtain his construction finance from other sources. However, the Federal Housing Administration will assist the builder in obtaining this financing by issuing commitments or agreements to insure mortgagees on buildings when completed. These commitments are of three kinds and contemplate three situations: first, where a definite purchaser has been procured in advance who will become the mortgagor; second, a commitment to an unknown buyer; and, third, to the builder as mortgagor, when he can show that with his own capital he will be able to finance any part of the cost not covered by the proposed mortgage and will be able to carry the mortgages on a reasonable number of vacant or unsold dwellings, and that the project is economically sound.

Lending institutions must determine for themselves the extent of the temporary financing which they will grant. They will take into consideration the following points:

Where the commitment to a known buyer has been obtained, a building loan will be readily available. The lending agency in this case has the assurance of refunding the temporary loan by an insured mortgage as soon as the building is completed. Consequently the personal credit of the builder is not a vital consideration.

Where the commitment is to an unknown buyer, the situation is entirely different and the granting of the building loan depends almost entirely upon the lender being satisfied as to the personal credit of the builder and the probability of a sale. These matters the lender must determine upon its own responsibility. While it is assured of refunding if and when the property is sold to a qualified mortgagor, the lender must decide for itself whether the builder is financially able to carry the property and the building loan for an indefinite period.

When the commitment has been issued to a builder, as a prospective mortgagor, temporary financing will be easily obtainable. In this case the lender is assured both as to time and credit. The FHA has assumed the burden, before issuing the commitment, of determining whether the builder is able to carry as many properties as he has obtained commitments for. The building loan is sure to be refinanced as soon as the construction is completed.

At the present time the FHA is using as a basis of calculation of the credit required an invested capital sufficient to yield 1% per month on the total of all mortgages upon which commitments are to be issued.

There remains to be considered the larger building projects commonly called subdivision developments. The application of the Act to such projects is covered by Circular No. 5. An undeveloped situation is defined as a tract which is laid out to provide ten or more dwellings, and upon which less than 25% of them have already been built.

All requirements of preceding circulars must be complied with, and in addition approval of the project must first be obtained. In arranging for this approval the FHA has reserved to itself a complete control of new developments sought to be financed under the Act and will bring to the determination of the question as to whether the project should be financed a very careful examination of the economic soundness and desirability of carrying out the development.

This circular is advisory rather than definite, and sets out the general basis for determining the soundness of a development project, bringing forward many considerations which have hitherto been often neglected, with consequent disaster. Each project will have to be considered separately and on its own merits. The circular is carefully worked out and in itself comprises a handbook on the subject of real estate housing development.

The method of instituting proceedings to obtain insurance is the same for all mortgages, assuming that the proposed mortgagee has qualified and that the required approvals in the case of operative builders and developments have been secured.

Application must be made by the proposed mortgagor and mortgagee upon the forms furnished, which differ in cases of new construction and refinancing existing buildings. Upon the filing of the application an appraisal of the property will be made by the FHA and approval granted or denied. If approved, the

mortgage will be closed under the supervision of the FHA.

The rights of the insured mortgagee and the method of indemnifying it under the insurance contract in case of defaults are set forth at length in Article XI of the Regulations (Circular No. 1).

If the mortgagor defaults in any payment for ninety days, the mortgagee must notify the Administrator of the default, and at the same time make demand for payment upon the mortgagor. The mortgagor then has a further period of thirty days in which to make good the default.

Thereafter the mortgagee must, in order to preserve its rights under the insurance contract, within thirty days either arrange to obtain a deed from the mortgagor, subject to the consent of the Administrator, or begin foreclosure within the same period.

If the mortgagee obtains title through foreclosure or otherwise, it may within thirty days tender a deed, without warranty, to the Administrator, together with an assignment of all claims connected with the mortgage.

If the mortgagee tenders a good title, and the property has not been damaged by fire or other casualty, the Administrator must accept the deed and deliver the following to the mortgagee:

(a) Debenture bonds to be known as Federal Housing Administration Debentures, which are payable three years after due date of the mortgages insured, and all of them issued on mortgages insured before July 1st, 1937, will be guaranteed by the United States as to principal and interest. These debentures are subject only to such taxation as the mortgage would be subject to. The amount of the debentures will be the unpaid balance of principal due on the mortgage plus any expenditures made by the mortgagee for taxes and insurance prorated to the date of transfer to the Administrator.

(b) The Administrator shall also deliver to the mortgagee a Certificate of Claim covering the amount of foreclosure costs, attorney's fees, unpaid interest on the mortgage up to the time of transfer of the property to the Administrator and any other amounts due to the mortgagee, such as expenditures for repairs, etc. This certificate is not a promise to pay absolutely, but only gives the mortgagee a right to participate in the proceeds thereafter derived from the property by the Administrator and from the claims transferred to the Administrator. This Certificate of Claim bears interest at 3%.

The Administrator thereafter may rent, renovate or sell the property.

The ultimate proceeds will be first applied to any expenditures made by the Administrator and next to payment of the Certificate of Claim. Any balance, of course, goes to the mortgagor.

Briefly stated, the insurance provides a guarantee by the United States of principal and interest in cases in which title can be obtained by the mortgagee in mortgages insured prior to July 1st, 1937. Thereafter the guarantee is supported by the mutual principal.

The project, however, is not fully mutual, as the premium of not exceeding 1% cannot be increased by assessments in case of loss as in ordinary mutual associations.

The premium fixed by the Act is deemed amply sufficient. The mortgages are to be divided into groups of the same maturity dates and similarity of risks. A separate account is maintained for each group, and as soon as the credit balance of this account exceeds the total unpaid principal of the mortgages in the group by 10% of the premiums paid in, all mortgages will be paid off out of this surplus. The Federal Housing Administration has calculated that in a group of twenty year mortgages having a low loss average, this provision should result in liquidating the mortgages in about seventeen years.

On the other hand, if the credit balance in the group account has not by July 1st next preceding the due date of the mortgages reached the full amount of the balance of principal then due, plus 10% of the premiums received, the Administrator shall transfer 10% of the premiums to the general reinsurance account and distribute the balance pro rata to the mortgagees. The insurance then terminates. This provision releases the Federal Housing Administration from the practically impossible position of having to absolutely guarantee that the 1% premium would be actually sufficient.

For the purpose of facilitating the operation of Title II and of providing a wider outlet for the insured mortgages the National Housing Act, in Title III, authorizes the Federal Housing Administrator to create national mortgage associations, which are to be federal corporations empowered to purchase and sell first mortgages on real property up to 80% of its appraised value.

These associations are to be formed like ordinary state corporations upon the application of private persons. Each must have a paid up capital of $5,000,000, will be subject to the same taxation as state corporation and will be under the supervision of the Federal Housing Administrator.

The theory upon which these corporations have been conceived is that they, being national in scope, will be able to gather capital where it is plentiful and employ it where it is scarce. Each corporation may issue bonds up to ten times the par value of its capital stock, but in no case exceeding the current face value of the insured mortgages which it holds, plus its cash on hand and its investments in securities guaranteed by the United States.

These provisions show that it is intended that these national mortgage associations shall function as a rediscount bank or outlet for the sale of insured mortgages taken by other lending agencies, as the associations will be approved mortgagees to whom insured mortgages may be sold without loss of the insurance.

So far the necessary regulations governing these associations have not been issued by the Federal Housing Administrator and no association has yet been organized.

At this writing (March 12, 1935) there are before Congress, as part of the Administration program, bills to amend the National Housing Act in relation to National Mortgage Associations by reducing the required capital from $5,000,000 to $2,000,000 and increasing the total of the debentures which they may issue from ten to fifteen times the amount of the capital stock. These changes are of course designed to encourage the organization of the associations, as apparently the original requirements were not sufficiently attractive to provide capital.

While the extent of the operation of these associations has not yet been clarified by the necessary explanatory regulations, it seems that they may perform two functions, acting both as the original lender upon insured mortgages and also as the purchaser of such mortgages made by other institutions. In both capacities they should materially promote the success of the Act.

HOW THE DOCTORS SOLVED THE COORDINATION PROBLEM

An Account of the Reorganization and Present Constitution of the American Medical Association

IN THE questionnaire sent out in 1915 by the Wigmore Committee, appointed to consider and report on desirable changes in the structure of the American Bar Association, one of the questions read as follows: "Do you believe that some sort of a federation of the members (like that of the American Medical Association) for national, state, county, and city associations is desirable; and if so, by what method?" Nine years later, a memorandum on national federalization of the bar filed by President R. E. L. Saner as an appendix to his presidential address, contained a full discussion of the structure of the American Medical Association. In the statement made by the Committee on Coordination of the Bar published in the April, 1932, issue of the JOURNAL, further references to the American Medical Association are made. The present Coordination Committee, as it has pointed out, is now seeking the opinion of the bar in reference to the most feasible way of making the American Bar Association a representative organization, and it is evident that in the discussion of that problem there will be frequent references to the organization of the national association of doctors. It would, therefore, seem timely to present an accurate picture of how the American Medical Association is constituted today and how the changes brought about by the reorganization of 1901 were effected.

The first annual meeting of the American Medical Association was held in 1847. By the original constitution, every ten members of an auxiliary medical society, which included state, district, and local societies, were entitled to send a delegate to the association. At first the representative nature of the organization was preserved, but as time went on and the national association grew, it became impossible to make any kind of a real check on these delegates. About forty years after its foundation, the need for reorganization became very apparent and a plan was proposed by a committee, and eventually rejected, which was in substance similar to that adopted fourteen years later.

By 1901 there were 10,600 members of the association, and an additional 8,200 subscribers to the Journal. The membership consisted of those members of affiliated societies who had applied for membership and those who had been elected delegates to the American Medical Association and thereafter became "permanent members." A large number of those who then attended the annual meetings, although presumably delegates, in actual fact came without any authority to represent others, because it had become the custom for secretaries of state and local societies to issue delegates' certificates to whoever requested them. At the conventions delegates and non-delegates, visitors and guests, were intermingled indiscriminately, and when a vote was taken the entire assemblage voted if it desired to do so. Objections to conditions which then existed centered around the impossibility of adequate deliberation by an assembly of the size to which the annual conventions of the Association had grown. It was also pointed out that the assembly was dominated by the members from the nearby states and did not possess a really representative character, although it was still ostensibly a group of delegates, and that many doctors who had come to the convention to improve their knowledge through attendance at the scientific sessions were obliged to listen to addresses on economic and medico-political subjects which concerned the profession instead of having adequate time for the medical sections in which they were particularly interested.

The committee of three which was appointed in 1900 to propose a plan of reorganization, and of which Dr. George H. Simmons, for many years editor of the Journal, was a member, held a number of meetings in different parts of the country which were attended by many representative physicians, for the purpose of a thorough discussion of reorganization plans. Subsequently correspondence was initiated and suggestions were asked from 500 of the leaders of the profession, and finally the plan was thoroughly discussed at a meeting of delegates of the state associations and a large committee of the American Medical Association at the time the Association met in Minneapolis in 1901. After having been passed on by this body, it was adopted by the Association, practically without opposition.

The principal change made at that time was the creation of a House of Delegates, which was given the power to legislate for the Association. The right of representation in this body was limited to state associations, and they were empowered to send delegates to it in accordance with the number of their own members. It was provided that this representation should be on a basis of one delegate for every five hundred members, the total assembly, however, not to exceed 150, and each state and territory to have at least one representative. Each section of the national association, as well as the military, naval, and public health services of the United States, was also allowed one delegate. The ex-presidents, the members of the several councils, and the trustees of the Association, including the president and president-elect, were made ex-officio members of the House of Delegates, without the right to vote. A subsequent amendment raised the number of delegates to 175, and provided for a reapportionment every three years.

An integral part of the plan was that each state should appoint a Committee on Organization and immediately raise funds and employ an organizer to organize the profession in that state into county associations. The state societies were immediately to take action to federate with the national association, and were to extend to county societies the privilege of having their members become ipso facto members of the state association. The county societies were then to assume the payment of dues for each member to the state associa-

tion. The original plan was that these dues should be $1.00 per member. In other words, the county association was to become the unit, and its delegates were to legislate for the state association, which was, in turn, to supply the members of the national House of Delegates. In some states these local societies did not then exist, and in others they were scarce. The state organizations were the big outstanding fact, and the reorganization imposed on them the task of fully organizing the county units.

Membership in the American Medical Association remained a matter of application, plus the payment of annual dues, except that whereas, before any member of a recognized local, district or state association had been eligible, the new constitution required every applicant to be a member of his state association, or of an affiliated local, which carried state membership with it.

The plan was enthusiastically accepted by the medical profession. By 1905 the membership of the national organization had increased to 17,570, and all states and territories except three had organized on a uniform plan. By 1910 every state and territory but one had come in, and the membership in the county societies had grown to over 70,000. The American Medical Association Journal in that year commented editorially on the results of the reorganization in the following language:

"During the past nine years the American Medical Association has accomplished more for improvement of conditions in the profession and for the good of the public than during all the previous years of its existence. This is a strong statement, but a true one. What has been accomplished was made possible by the reorganization of the Association and its various branches in 1901."[1]

A further amendment to the constitution in 1913 provided that all members of constituent state and local associations were also members of the American Medical Association without the payment of further dues. However, this membership did not give the privilege of attending the annual meeting or of receiving the Journal. These rights were reserved to the group of dues-paying members, who were known as "fellows."

Under the present constitution, the American Medical Association is a federacy, which is defined as "a federation or union of several states under one central authority, consisting of delegates from each state in matters of general polity, but self-governing in local matters." Every member of a county or district medical society which has been chartered by a state or territorial society is also a member of both the state society and of the American Medical Association. There are 2,074 such societies in the United States and its possessions, including all counties except 427 which still remain unorganized. All state and territorial associations belong to the federacy. The House of Delegates, constituted entirely of delegates from state associations, from the sixteen sections, and from the army, navy, and public health services of the United States, has full legislative powers and also elects the general officers. The delegates themselves are elected for staggered terms of two years, and must have been both members of the American Medical Association and "fellows" for two years previous to their election.

A single set of dues is paid, which is divided between state and local associations and includes membership in those and the national medical association. From these dues, which averaged about $21.00 in the larger cities in 1929*, from $8.00 to $10.00 generally goes to the state association.** The American Medical Association receives no part of them. Its income is derived entirely from the dues of its "fellows," who, as has been stated, have the privilege, not accorded to members, of attending the annual meeting and of receiving the Journal, and from the profit made by the Journal. The dues of the "fellows" are now $7.00 a year, which is the same as the cost of a subscription to the Journal. An educational requirement prescribed for "fellows" providing that they shall hold a degree of M. D. or its equivalent granted by a medical school approved by the American Medical Association, is in effect, but it is provided that in exceptional cases a graduate of an unapproved school may be admitted. All applications for admission to fellowship have to be passed on by a board known as the Judicial Council.

The officers include a president, a president-elect, and a vice-president, and the by-laws provide that neither the president nor the vice-president may succeed himself, that the vice-president may not be chosen president-elect, and that no member of the House of Delegates shall be eligible to either office. The president-elect automatically takes office as president at the opening session of the annual meeting. A board of nine trustees is elected for staggered terms of five years each, and in addition to superintending the publication of the Journal, they have a veto power in reference to any resolution passed by the House of Delegates pertaining to the expenditure of money. The House of Delegates ordinarily meets only at the time of the annual convention. For the first time since the war, it was called into special session in Chicago on February 15th of this year, to consider the social and economic policies of the Association as related to pending and proposed legislation in Congress.

The annual convention of the American Medical Association starts with a meeting of the House of Delegates on Monday morning. On Monday afternoon and on Tuesday a series of important clinical lectures is given. The first and only general meeting of the Association is held Tuesday evening, at which the inaugural address of the incoming president is the main feature. The following three days are devoted to meetings of the sixteen sections, eight of the sections meeting each morning and eight meeting each afternoon. The House of Delegates, in addition to its opening session on Monday, usually meets Tuesday morning and Thursday afternoon. There is a president's reception Thursday evening, but no annual banquet. An important part of the meeting is the Scientific Exhibit, which usually fills an entire floor of a large auditorium. It consists of 150 to 200 exhibits in which the leading investigators of the country demonstrate the medical advances of the previous year.

The gross income of the American Medical Association for the year 1933 amounted to $1,472,000, with a net income of $88,000. The principal items of that income were $540,000 from fellowship dues and subscriptions to the Journal and $715,000 from advertising. The Journal itself is a weekly, and is responsible in great part for the $3,000,000 shown on the books of the Association as its net worth. The Association owns and occupies a six-story building in Chicago, publishes nine magazines in addition to the official journal, conducts a large mailing and order department, gets out a biennial directory, publishes a quarterly index of some

1. American Medical Association Journal, March 2, 1910, Page 876.

*Bulletin of Medical Society of County of Kings, N. Y., Vol. 8, No. 10 (Oct., 1929), p. 164.

**Am. Med. Assn. Bulletin, Vol. 26, No. 5 (May, 1931), p. 108.

1,200 medical periodicals, and has over 500 employees.

At the time of the last annual report, 98,041 doctors were members of the Association by virtue of their membership in county and state societies, constituting 67 per cent of the 161,300 doctors in the United States. There were 60,714 "fellows" in the Association as of April 1, 1934, and about 16,000 additional subscribers to the Journal. The "fellows" constituted about 37 per cent of all doctors in this country. These figures compare with 35,000 dentists belonging to the American Dental Association, or 49 per cent of the total number shown by the 1930 census, and 54,763 engineers belonging to the five principal engineering associations, or 24 per cent of the number in those classifications shown by the 1930 census. The membership in the American Bar Association as shown by the 1934 annual report is 27,036, which constitutes 16 per cent of the 160,605 lawyers in 1930.

WILL SHAFROTH,
Director of National Bar Program.

LOS ANGELES PREPARES FOR THE AMERICAN BAR ASSOCIATION

BY EWELL D. MOORE
Member of Los Angeles Bar; Chairman of Publicity Committee

SHOULD you be among the fortunate thousands who will come to Los Angeles next July for the American Bar Association Convention—and it is not too early to be thinking about it—you will be greeted and fêted in a manner you will long remember. Los Angeles is used to conventions; it is "convention conscious." But this is one convention it regards as out of the ordinary—something special, to be thought of and prepared for months in advance. Therefore, Los Angeles is already making plans, unusual in character, for the comfort and entertainment of the delegates, their wives and other guests who attend the sessions of this great annual gathering of lawyers.

Those who journey across the continent to this Southwest metropolis for this year's convention will not be among strangers altogether, for there is in Los Angeles County the greatest aggregation of lawyers who came "from other states" to make their homes and lend their talents to a comparatively new community, ever gathered anywhere; men and women who speak the language and share the problems of lawyers everywhere. There are almost 6,000 lawyers in this one California County, nearly half the total number of lawyers in the State of California. Most of them are keenly interested in making the convention the greatest ever held, and it promises to be just that.

Perhaps never before has the lawyer, in all the long and colorful history of the profession, faced a more critical period; certainly at no time in the past has there existed so obvious a necessity for unified action, or a more firm determination to meet the attacks, solve the real problems that beset us upon every side, and restore the profession to the deservedly high position it once occupied, and which it will again occupy.

This crisis, and the knowledge that a real and concerted movement, with tremendous momentum, is being sponsored by the American Bar Association to face and overcome it, makes the Los Angeles Convention one of the exceptional interest and promise. Nor is this interest confined to lawyers. The public is concerned—deeply and properly concerned; for the public has a right to, and does, expect the Bar to assume and hold leadership in needful reforms in the administration of justice, in the suppression of crime, in providing the procedure for obtaining speedy justice, and the clearing of its ranks of faithless members.

Knowing that these subjects will be discussed, as they have been at all recent conventions of the American Bar Association, and that perhaps a real constructive program will be adopted to improve the waning confidence in the law, promises to give the 1935 Convention a "news value" which no previous convention has had.

In short, it will furnish a great opportunity for the legal profession to recapture public notice and bring new confidence.

The Entertainment Program

But let us see what Los Angeles, and the Bar of California, promise for the lighter moments of its guests. First, it will provide a convention meeting place in the very heart of the business section. Philharmonic Auditorium is "five minutes from anywhere" in downtown Los Angeles. It faces beautiful Pershing Square, picturesque and tropical in character. It is only across the street from the Biltmore Hotel where doubless the greatest number of delegates will stay. All around are the clubs, theatres and good restaurants. So much for the staging of the convention.

During the entire week of July 15th there will be things for the delegates and their families to see and to do beside sitting in convention sessions. The General Committee of Arrangements, of which Honorable Gurney E. Newlin, Past President of the American Bar Association, is Chairman, will see to that. Every day the great Huntington Library at Pasadena, with its priceless and world famous display of art and literature, will be open to visitors. Special buses will take members and their wives to the Library, a delightful trip of fifteen miles, daily. An unusual exhibit of historical legal documents, of extraordinary interest to lawyers, will be arranged. When you have seen the wonders of this exhibit, nowhere else available in this country, you will be entertained with refreshments and taken for a trip through beautiful Pasadena and its environs.

Of course, excursions will be arranged to view the great motion picture studios, where visitors will

be shown pictures in the making and guests will see in person picture stars whose faces and voices have been made familiar to the public everywhere from the screen.

"Making of the Constitution"

The Los Angeles Bar Association will reproduce its pageant given last November, of "The Making of the Constitution."

This wonderful pageant was produced in the largest auditorium in Los Angeles, holding some 6,000 people, and thousands of the public were turned away. It will be reproduced for the Convention in the Philharmonic Auditorium, the same theatre in which the Convention meets. No event of an historical character attracted as much interest with the public as this pageant. Even Will Rogers, the "Sage of Santa Monica", became enthusiastic about it. In his syndicated daily comment he had this to say:

"Well sir, here is something I would like to see all your cities and towns do.

"The Los Angeles Bar Association put on a pageant called 'The Making of the Constitution.' (They say it was originated in Kansas City.) Well, it's a great thing. It shows Benjamin Franklin, Washington, Madison, Hamilton, and all those old 'rope wigs' fighting during the making of our Constitution. Young as well as the old will profit by it, and really enjoy it.

"Write and get your information from the Los Angeles Bar Association. You can put it on for some good charity, or free admission.

"I am not press agent for any bar association. I just saw it, and thought it was great, and it's a great thing to do at this time. It's not expensive to put on, just the renting of the costumes is all.

"Do this, and you will thank me some day.

"Yours,

"WILL ROGERS."

There will also be the opportunity to see and hear the "Symphony under the Stars" at the famous Hollywood Bowl, unique in its setting among the mountains that rise behind the cinema capital of the world.

The special trains bearing the delegates from the east will stop at Grand Canyon and the great Boulder Dam on the Colorado River, in coming west, and at Yosemite, San Francisco and Yellowstone Park in returning east. So you see, the trip is going to be worth while from a sightseeing standpoint, as well as the opportunity to attend a convention which will no doubt be productive of matters of vital interest to lawyers throughout the United States.

FEATURES OF THE TRIP TO LOS ANGELES

Colorado Springs, Manitou and the Pikes Peak Region

FEW places in the world offer such a variety of immediately accessible natural beauties and marvels as the Pike's Peak region. Colorado Springs is a city world-famous for its large number of magnificent residences and estates, its parks, polo fields and fine hotels, and its extraordinary scenic location almost at the foot of majestic Pikes Peak, rising up out of the plains. Adjoining, to the west, and nestling in the mouth of a rugged canyon, is the picturesque resort town of Manitou, with its famous mineral waters and baths and its varied amusements for the vacationist.

The summit of Pike's Peak is easily reached, either by the famous cog railroad or by a wide, smooth automobile highway. As the Peak is detached from the main mountain ranges, the view from its 14,109-foot summit is seemingly limitless. Another spectacular highway zig-zags directly from the plains up the face of Cheyenne Mountain, where a quaint inn has been built. Also, easily accessible by automobile, are the Seven Falls, North Cheyenne Canyon and the High Drive, Ute Pass, the Cave of the Winds and the never-to-be-forgotten Garden of the Gods.

The Broadmoor Hotel is six minutes from Colorado Springs on a concrete boulevard. It is 200 feet higher than the Springs, making possible beautiful views of surrounding mountains and plains. The hotel, which is open all the year, offers to its guests the facilities of an indoor swimming pool, outdoor swimming in Broadmoor Lake, a gymnasium with squash, racquet and handball courts, bowling alleys, etc., one of the world's great golf courses, designed by Donald Ross, saddle horses, and miles of bridle paths through spruce and pine forests.

Salt Lake City, Utah

Salt Lake City, the capital of Utah and of the Inter-Mountain empire, has much to offer beyond its early Mormon associations and its great salt sea. Situated in the curve of a huge crescent formed by the canyon-divided peaks of the Wasatch Mountains, and with the great lake in its front yard, it is aptly termed, "The most entrancingly beautiful city in America."

Saltair is the only bathing beach of its kind on the western hemisphere. The water, a solution of 22 per cent salt, makes drowning impossible.

Visitors to Salt Lake City give attention first to Temple Square. On this ten-acre plot has been built the Temple, Tabernacle, Museum and other buildings of the Latter Day Saints (Mormon) Church. The marvelous acoustic properties of the huge, dome-roofed Tabernacle, which was constructed without the use of nails, and the mellow-toned pipe organ which it houses, are among the world's wonders. At noon each day, except Sunday, all visitors to Salt Lake City are invited to visit Temple Square and the Tabernacle for the organ recital.

Boulder Dam

Boulder Dam is located in the upper Black Canyon of the Colorado River about 30 miles

southeast of Las Vegas, Nevada, where the river is the Nevada-Arizona State boundary.

Boulder Dam, when finished, will be the largest dam in the world. Its height will be 727 feet above bedrock, which will raise the water level of the river 584 feet.

The thickness of the dam will be 45 feet at the top and 660 feet at the base. Its width at the crest will be 1,180 feet.

The dam is of the arch-gravity type, in which the water load is carried by both gravity and horizontal arch action.

It will form a reservoir about 115 miles in length and varying in width from a few hundred feet in the canyons to a maximum of eight miles. It will cover an area of 145,000 acres or 227 square miles.

The Boulder Dam project required about four years to build and will cost $165,000,000, including $38,500,000 for the All-American Canal and $2,000,000 for the construction of Boulder City. Construction work was started in April, 1931.

The gigantic power plant just below the falls will have a rated capacity of over 1,800,000 horsepower of energy. This is approximately twice as much as the total combined energy developed at Niagara Falls (United States) and Muscle Shoals.

One of the principal objects of the Boulder Dam project was the protection of vast rich areas of agricultural lands below the dam-site which were constantly menaced by flood waters from the Colorado River. Draining a great watershed covering portions of seven large western states, the usually mild and gentle river sometimes becomes a raging monster when millions of acres of winter snows are melting under a warm spring sun.

The special train reaches Las Vegas early Sunday morning, July 14th, and members of the party will have an opportunity to view the dam before continuing the journey to Los Angeles.

Railroad Fares

As regular summer excursion rates to California will be in effect from May until October, and are less in amount than the regular fare less reduction allowed under Individual Certificate issued to members in connection with meetings held in parts of the country not having the advantage of summer excursion rates, reduced rate certificates *will not* be sent out in connection with the meeting at Los Angeles.

Final Plans for the Trip

Complete announcement with detailed itinerary, rates, and other information has been printed and will be mailed upon request addressed to the Association's Headquarters, at 1140 North Dearborn Street, Chicago.

Hawaiian Invitation Accepted

The Executive Committee has accepted the invitation extended to members of the Association attending the Los Angeles meeting to visit the Hawaiian Islands, the invitation having been received from the Governor of Hawaii, Hon. Joseph B. Poindexter, on behalf of the people of the Territory, and from Hon. R. A. Vitousek, Acting President of the Bar Association of Hawaii.

The Committee on Arrangements has selected for the outgoing trip the Matson Line steamer "Malola", sailing from Los Angeles on Saturday July 20th, and for the return voyage, the Matson Line steamer "Lurline", sailing from Honolulu on Saturday, August 3rd.

A number of members of the Association have already expressed their intention of joining the party, and others who may wish to do so should promptly communicate with the Executive Secretary, 1140 North Dearborn Street, Chicago, who will thereupon furnish to the inquirer complete information with reference to rates, space, and hotel reservations in Honolulu.

Arrangements for Annual Meeting at Los Angeles July 16 to 19, inc., 1935

HEADQUARTERS: BILTMORE HOTEL

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
Biltmore	$3.50 to $5.00	$7.00	$7 to $ 9	
Ambassador	5.00 to 7.00		7 to 11	$18 to 22
Clark	2.50 to 3.00	3.50 to 4.00		7 to 15
Hayward	2.00 to 5.00	3.00 to 7.00		
Mayfair	2.50	3.50	4.00 to 5.00	
Mayflower	2.50 to 3.50	2.50 to 3.50		
Rosslyn	2.50	3.50	4 & 5	10
Savoy	2.50 to 3.50	2.50 to 3.50		

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one* person. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Space at the Biltmore will be exhausted very shortly and therefore reservations should be made promptly, and second choice of hotel should be indicated. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

CHARLES A. BOSTON

It is hard to think of the American Bar Association functioning without the presence and help of Charles A. Boston. He was such an active force in the organization, he stood so clearly and unflinchingly for its highest ideals, and he was such a regular attendant at its Annual Meetings that he had come to seem almost an essential part of the institution.

The position which he had attained in the Association and in the regard of his fellow members was the result not only of his professional ability and high personal character but also of over twenty years of tireless industry in the work of the organization. He was no merely ornamental member; he bore his full share of the heat and burden of the day. He will be sadly missed, but the good he has done for the profession will live long after him.

In his successful professional career he exhibited the same ability and the same patient and persistent industry which made him one of the outstanding men of the Association. And, to complete the picture of a rounded lawyer, he showed a marked and continued interest in the literary side of the law, and made numerous contributions to legal current literature on constitutional and other subjects.

In the next issue we expect to print a tribute to our former President by one who had learned to know and esteem him through many years of professional association. Here we can only hope to express inadequately the genuine sorrow which so many of his associates feel at the news of his unexpected and untimely death.

ONE WHO "LIVED GREATLY" IN THE LAW

In his various papers and addresses the late Mr. Justice Holmes sums up that philosophy of life which is implicit in his opinions as a judge. Life is a constant change and flow, certainty is an illusion, and repose is not the destiny of man. Life is also a struggle, and "after all the place for a man who is complete in his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace."

But this struggle is no mere absorption in concrete and lower ends and aims. It is simply a necessity of a full life. And it gains an added splendor at every point from its relation to a dimly apprehended unknowable. Speaking specifically of the lawyer's work, he says: "The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."

Coming to the court house and the market, to use one of his phrases, how does his philosophy which recognizes change as a law of the universe, which forbids as unwise the attempt to shackle it by out-worn forms whose meaning has passed away, manifest itself in his daily work? The answer of the man in the street would doubtless be, "in his liberalism." But if it does, it is certainly not in that liberalism which is only "a vague and windy hope." Nor is it in a liberalism with any particular economic connotation. In fact, Justice Holmes' expressions as to his economic views would certainly be anathema to many people today. His liberalism has in it nothing of the propagandist. It is the attitude of a mind which has risen above the static conception of life and institutions and, within the limits of the law as it exists, is prepared to apply a higher philosophic view to the decision of practical affairs.

He brings Heraclitus, with his principle of the eternal change and flow, to the decision of many a case in which the right of a State to pass some special piece of legislation, social or otherwise, is involved. Whether writing the prevailing or the minority opin-

ion, he always insists that there is nothing in the Federal Constitution which prevents the States from indulging in reasonable experiments. He gives the States the benefit of every doubt and, whether he thinks the legislation wise or not, is quick to find possible grounds for the action which remove it from the category of the arbitrary and the unreasonable. As Mr. Frankfurter says in his contribution to the volume published in honor of Justice Holmes on his ninetieth birthday:

"In the hundreds of instances in which legislation has been challenged in the name of the Fourteenth Amendment, Mr. Justice Holmes has been loyal to his philosophy. Government means experimentation. To be sure, constitutional limitations confine the area of experiment. But these limitations are not self-defining and were intended to permit government. The door was left open to trial and error—'constitutional law like other mortal contrivances must take some chances.' Opportunity must be allowed for vindicating reasonable belief by experience. Above all, Mr. Justice Holmes has sturdily resisted every tendency to impose upon the forty-eight states the court's views or assumptions of social policy. He has given meaning to our Federation, satisfying the requirements of national uniformity as well as of local diversity."

Justice Holmes' judicial adaptation of the principle that "much is to be pardoned to the spirit of liberty" finds its expression in various decisions involving individual rights —and this kind of case is probably what most people have in mind when thinking of his judicial attitude. For instance, in his dissenting opinion in the Rosika Schwimmer case—in which she was barred from citizenship because of her extreme pacifism—he said: "Some of her answers might excite popular prejudice, but if there is any principle of the Constitution which more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."

Reference to minority and majority opinions suggests a misapprehension as to Justice Holmes. He has been called "the great dissenter," and the impression is abroad in the land that he was in continual protest against the views of the majority of the Court. In point of fact, his dissents are a relatively small part of his judicial work—though their significance may make a mere statistical comparison inadequate. But for the greater part of the time he and his fellow judges were in accord as to the law, and when he dissented he frequently had a relatively numerous company—even a party of four. The late Chief Justice Fuller, Justice White (before he became Chief Justice), the late Chief Justice Taft, Associate Justice McReynolds—to mention a few—were sometimes of that company.

No judge ever had a clearer or more realistic view of the judicial function, or discharged it with more complete consistency. At the bottom of the process as he applied it was an absolute intellectual honesty. He insisted on "thinking things" instead of words. When the question was, for instance, whether a defendant had been deprived of due process of law by conditions of public excitement and intimidation surrounding the trial, he was not content with an acceptance of evidence of merely formal compliance with customary procedure. He struck through formalities to facts. When a principle of law of hoary historical antecedents was involved, which seemed to lead to undesirable results under present conditions, he was quick to avail himself of history as a guide through the form back to the original substance and the end to be achieved.

He was careful to avoid even the appearance of attempting to intrude his personal and economic views into his decisions. But he realized that judges do legislate, though only "interstitially." He asserted that "behind the logical form of the decision lies a judgment as to the relative worth and importance of competing legislative grounds." Where certain constitutional principles, to quote Mr. Frankfurter, "are so definite in their terms and history that they canalize judicial review within narrow limits," he of course observed those limits. "But where the broad undefined clauses of the Constitution and the general ideas which underly it give rise to different problems for adjudication," he applied both his philosophy and his statesmanship, always working in the spirit of Marshall's pregnant saying that "it is a Constitution which we are expounding."

Mr. Justice Cardozo, the friend, admirer and associate of Mr. Justice Holmes, in his article in the Ninetieth Birthday Volume, pays a tribute which may fittingly end this inadequate editorial: "To the lips of eager youth comes at times the halting doubt whether law in its study and its profession can fill the need for what is highest in the yearnings of the human spirit. Thus challenged, I do not argue, I point the challenger to Holmes."

REVIEW OF RECENT SUPREME COURT DECISIONS

New York Milk Control Act Held Unconstitutional to the Extent That It Attempts to Fix the Price Paid by Dealers to Producers for Milk Bought in Other States—A State Statute Imposing Certain Part of the Cost of Eliminating Grade Crossings at Railroad-Highway Intersections, Though Valid When Passed, May Become Arbitrary and Unreasonable as Applied to a Particular Case by Reason of Changed Economic Conditions—Proper Federal Practice Where Jury Has Returned Inadequate Verdict for Plaintiff—Application for Habeas Corpus on Ground Prisoner Is Restrained without Due Process of Law Must First Be Made to State Court—Discretion of Federal Courts as to Appointment of Receivers When State Laws Provide Procedure for Liquidation of Insolvent Companies—Damages for Copyright Infringement

By Edgar Bronson Tolman*

State Statutes—New York Milk Control Act—Validity of Provisions Regulating Price Paid to Producers in Other States

The provisions of the New York Milk Control Act, to the extent that they attempt to fix the price paid by dealers to producers for milk bought in other states, are unconstitutional as an attempt by the state to regulate interstate commerce.

Such provisions are invalid both as to milk sold in the original containers and as to milk bottled after arrival in New York.

Baldwin v. Seelig, Inc. 79 Adv. Op. 525; 55 Sup. Ct. Rep. 497.

This opinion dealt with the validity of the New York Milk Control Act as applied against a dealer who has acquired title to milk as the result of a transaction in interstate commerce. G. A. F. Seelig, Inc. (referred to in the opinion as Seelig) is engaged as a milk dealer in New York City. It buys milk and cream in Fair Haven, Vermont, from Seelig Creamery Corporation (referred to in the opinion as the Creamery). It is conceded that title passes in Vermont. The milk is sent to New York in 40-quart cans, daily shipments amounting to about 200 cans of milk and 20 cans of cream. On arrival in New York about 90% is sold to customers in the original cans, and the rest is bottled and sold to customers in bottles.

In New York, under provisions of the Milk Control Act and regulations issued under it, there has been set up a system of minimum prices to be paid by dealers to producers. One provision of the Act is, in substance, to the effect that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful in the state.

Seelig buys from Creamery in Vermont at prices lower than the minimum payable to producers in New York. The authorities in New York refused to license Seelig, unless it agrees to conform to the New York statute and regulations in the sale of the imported milk. This Seelig declines to do, and it is threatened with prosecution and penalties for trading without a license. The suit under review was brought to enjoin enforcement of the Act, as applied, on the ground of its invalidity under the Constitution. A District Court of three judges granted an injunction against enforcement as to milk sold in the cans or other original packages, but refused an injunction as to milk removed from the cans and sold in bottles. Both sides appealed.

On the appeal, the Supreme Court, in an opinion by Mr. Justice Cardozo, held that an injunction should be issued against enforcement of the Act and regulations as to all the milk, whether sold in the original cans or in bottles. As to the milk sold in the original package the opinion states:

> New York has no power to project its legislation into Vermont by regulating the price to be paid in that State for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.
>
> Such a power, if exerted, will set a barrier to traffic between one State and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a State, "except what may be absolutely necessary for executing its inspection laws." . . . Imposts and duties upon interstate commerce are placed beyond the power of a State, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Article 1, Section 8, Clause 3. "It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business." . . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the States. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." . . . If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the States to the power of the nation.

Contentions in support of the validity of the Act were considered. The first of these was predicated

*Assisted by James L. Homire

on the argument that the end to be served by the Act is the maintenance of a regular and adequate supply of wholesome milk, and that such supply is put in jeopardy when the farmers are unable to earn a living income; in short, that price security is but a special form of sanitary security, and that, accordingly, the regulation is to be upheld as within the police power. Rejecting this, MR. JUSTICE CARDOZO said:

> . . . This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a State will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor-relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

A further argument, urged in support of the law, sought to establish a relation between the economic welfare of the producer and the quality of the product. This argument was also found insufficient to support the challenged provision. As to it the opinion states:

> . . . We think the argument will not avail to justify impediments to commerce between the States. There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are also necessary for producers in Vermont. But apart from such defects of proof, the evils springing from uncared-for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other States. Appropriate certificates may be exacted from farmers in Vermont and elsewhere; . . . milk may be excluded if necessary safeguards have been omitted; but commerce between the States is burdened unduly when one State regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between States. . . One State may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the Legislature of Vermont and not that of New York must supply the fitting remedy.

In disposing of the second phase of the case, i.e., the validity of the Act as to milk bottled after arrival in New York, the Court pointed out that the "original package" test is not conclusive as to interstate transactions. Pointing to limitations on that test, MR. JUSTICE CARDOZO said:

> . . . In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. . . It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one State in its dealings with another may not place itself in a position of economic isolation. Formulas and catch words are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another State or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.
>
> The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate transactions were not meant to be a cover for extortion or suppression.

The case was argued by Mr. J. Daniel Dougherty for Seelig and by Mr. Harry S. Manley for Charles H. Baldwin, et al.

State Statutes—Validity of Requirements as to Contributions Toward Cost of Railroad Grade Crossing Elimination—Effect of Changed Economic Conditions

A state statute, though valid when enacted, requiring railroad companies to pay one-half of the cost of eliminating grade crossings, at railroad-highway intersections, may, by reason of changed economic conditions, become arbitrary and unreasonable and constitute a violation of the due process clause of the Fourteenth Amendment, as applied to a particular case.

In a suit brought in a state court to enjoin enforcement of such statute, is for the state supreme court to determine whether the evidence supports allegations and findings as to the arbitrary and unreasonable character of the statute as applied to the particular case.

Nashville, Chattanooga & St. Louis Railway v. Walters, 79 Adv. Op. 458; 55 Sup. Ct. Rep. 486.

In this opinion, by MR. JUSTICE BRANDEIS, the Court considered the validity of a statute of Tennessee as applied to the appellant, Railway, requiring it to pay one-half of the cost of an underpass for the separation of grades at the intersection of the railroad and a highway in Lexington, Tennessee. The Act in question, Chapter 132 of the Tennessee Acts of 1921, authorizes the Highway Commission to require the separation of the grades of highway-railway crossings, if in its discretion, "the elimination of such grade crossing is necessary for the protection of persons travelling on any such highway or any such railroad;" and without conferring on the Commission any discretion as to the proportion of cost to be borne by the railroad requires the latter, in every case, to pay one-half of the total cost of the separation of grades.

The order challenged related to the construction of an underpass in Lexington, Tennessee, to separate grades where a proposed state highway will cross the railway's main line, and required the railway to pay one-half the cost thereof. The Railway brought suit in a Chancery Court of Tennessee, under the Uniform Declaratory Judgment Act of the State, to secure an adjudication that the statute as applied by the order was unconstitutional, in that its requirement that the railway pay one-half of the cost was so arbitrary and unreasonable as to be a violation of the due process clause of the Fourteenth Amendment. The Chancery Court enjoined the Highway Commissioner from attempting to enforce payment by the Railway. On appeal the Supreme Court of Tennessee reversed the

decree and ordered the bill dismissed. On further appeal the decree was reversed in an opinion by MR. JUSTICE BRANDEIS.

In the opinion it was first noted that the Railway did not question the State's power to build the proposed highway; nor its power to require separation of the grades, the appropriateness of the plan, nor the reasonableness of the cost—$17,400. It did not deny that the separation would promote safety of travel on both highway and railway; it conceded the state's power, ordinarily, to impose on the railway the whole or any appropriate part of the cost of the elimination. The Railway's main contention was based upon the special facts shown, which it claimed disclosed a violation of the due process clause. The allegations of the bill of complaint and the evidence were summarized in the opinion. From this it appeared that the trial court had found that the allegations were established, with the exception of the allegation that the construction of the underpass was unnecessary. The State Supreme Court declined to consider the special facts relied on to show that the order, and the statute as applied, were arbitrary and unreasonable, and did not pass on the sufficiency of the evidence to support the findings; but held that the statute, on its face, was valid, and that the courts could not consider whether it had become burdensome or unreasonable, by reason of changed economic conditions. Holding that this view was in conflict with the decisions of the Supreme Court, MR. JUSTICE BRANDIES said:

> . . . A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. To this limitation, attention was specifically called in cases which have applied most broadly the power to impose upon railroads the cost of separation of grades. . .
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> Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them. The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents.

A review of the facts specifically found, or of which judicial notice could be taken, followed. For a complete statement of these the opinion itself is referred to, and it must suffice here to mention the following. The underpass was not required in the exercise of the police power but was required in furtherance of a state-wide and nation-wide plan, supported by Congress, to foster motor vehicle commerce on a system of public highways, much of which is in active competition with the railroads. The state highway, as distinguished from county and city roads and turnpikes, was a development for highway transportation throughout the nation. The federal government is directly interested in it from the point of view of national defense and the transportation of mails, and to achieve these ends has made large contributions to the states to aid them in the construction of federal-aid highways. Federal-aid highways are constructed to enable motor vehicles to travel at a speed commonly greater than that of trains, and the main purpose of the grade separation is to improve motor vehicle transportation. The highways are changing from railroad feeders to railroad competitors. The underpass is not proposed to meet local needs, but is intended as a link in a nation-wide system of highways. The present facilities are safe and adequate for local traffic. The underpass is proposed as a means of compliance with a condition on which federal aid is available. The new highway will enable motor vehicles to compete more effectively with the Railway and decrease its traffic, its revenues and its net earnings. The Railway, though suffering from the construction of the highway, is required to pay one-half of the cost of the underpass, while the owners of trucks and busses, who are the chief beneficiaries of the construction, are immune from making direct contribution to the cost.

Declaring that there was error in refusing to consider whether these facts established the unreasonableness of the order, and pointing out that particular individuals cannot be required to pay for a public improvement unless it bears reasonable relation to the evils to be eliminated or the advantages secured, MR. JUSTICE BRANDEIS said:

> The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. . .
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> It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . And it was stipulated that "in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands." But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. . .
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> It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost . . . that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; . . . and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. . . And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required.

The Court, in conclusion, pointed out that it did not pass on the question whether the findings were supported by the evidence, but that it left those and related questions for consideration of the Supreme Court of the State.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO were of the opinion that the decree should be affirmed.

The case was argued by Mr. Fitzgerald Hall for the appellant, and by Mr. Edwin F. Hunt for the appellee.

Federal Trial Practice—Motions for New Trial for Inadequacy of Damages—Power of Federal Courts

In actions at law in the federal courts, the proper practice in cases where the jury has returned an inadequate verdict for plaintiff is to grant a new trial. The trial courts, under the Seventh Amendment to the Federal Constitution, have no power to deny the plaintiff's motion for a new trial in such cases, on condition that the defendant consent to an increase in the verdict to an amount deemed adequate by the court.

Dimick v. Schiedt, 79 Adv. Op., 256; 55 Sup. Ct. Rep. 296.

In this case the Court considered the practice to be followed in law actions in the federal courts on motions for a new trial, made on behalf of the plaintiff, upon the ground that the damages awarded by the verdict are inadequate. The case arose in an action at law in the federal court in Massachusetts to recover damages for personal injury resulting from the defendant's negligent operation of an automobile. The jury found a verdict for the plaintiff for $500. On the plaintiff's motion, the trial court ordered a new trial upon the ground that the damages were inadequate. It imposed a condition, however, that the motion was to be denied if the defendant consented to an increase in the damages to $1,500. The plaintiff's consent to the condition was not required or given. The defendant consented to the increase, the motion for a new trial was denied, and judgment went for the plaintiff for $1,500. On appeal the Circuit Court of Appeals reversed the judgment, upon the ground that the conditional order violated the Seventh Amendment of the federal Constitution relating to the right to trial by jury. On certiorari the judgment was affirmed by the Supreme Court, by divided bench. MR. JUSTICE SUTHERLAND delivered the prevailing opinion.

The opinion states that the effect of the Seventh Amendment must be determined by resort to the rules of common law on the subject at the time of the adoption of the Amendment in 1791. An examination of the common law cases was thought to establish that, with certain exceptions, the English courts were without power to increase the damages found by a jury verdict. As to this MR. JUSTICE SUTHERLAND said:

> A careful examination of the English reports prior to that time fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions.
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> 1. In actions for mayhem, there are numerous ancient cases to be found in the Year Books, and occasional cases at a somewhat later period, in which the right of the court to increase damages awarded plaintiff, *super visum vulneris*, is recognized. We deem it unnecessary to catalogue or review these cases. Many of them are referred to in 2 Bacon's abridgement (7th Ed.) 611, and Sayer's Law of Damages (1770), p. 173 *et seq.* The last case called to our attention or that we have been able to find that recognized the rule is that of *Brown v. Seymour* (1742), 1 Wils. 5, where the court, while conceding its power to increase damages upon view of the party maimed, refused to exercise it, holding the damages awarded were sufficient. We have found no case where the power was exercised affirmatively since *Burton v. Baynes* (1733), reported in Barne's Practice Cases, 153, where the court, upon view of the injury, increased the damages from £11, 14 s., to £50. The power of the trial court to increase damages in such cases was seldom exercised; and it seems quite clear, from an examination of the decisions and of the English Abridgments, that the generally approved practice confined its exercise to the court sitting *en banc*. Moreover, the application for the increase was made by the plaintiff, considered upon a view of his wound, and, when favorably acted upon, granted absolutely and not as a condition upon which to base a denial of a new trial. Indeed, the practice of granting new trials in such cases did not come into operation until a later date. In any event, the rule was obsolete in England at the time of the adoption of the Constitution; and we are unable to find that it ever was acted upon or accepted in the colonies, or by any of the federal or state courts since the adoption of the Constitution.

Further examination of the English cases led to the following conclusion:

> From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration.

MR. JUSTICE SUTHERLAND, though observing that the opinion might be rested on the conclusion stated, nevertheless, goes on to discuss the contention that the established practice in the federal courts of imposing a condition that excessive damages shall be reduced or a new trial granted, requires the recognition of a converse rule where the damages awarded by verdict are inadequate.

In discussing this contention the opinion examined the common law basis for conditionally decreasing jury verdicts, and concluded that the practice of the federal courts in this regard was founded upon doubtful precedents, which should not be extended to weaken the constitutional right to trial by jury. As to this MR. JUSTICE SUTHERLAND said:

> In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Jusice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.
>
> Nevertheless, this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land. . . .
>
> That rule applies with peculiar force to the present case, since, accepting *Arkansas Cattle Co. v. Mann* (130 U. S. 69), and like cases, as settling the precise question there involved they do not conclude the question here presented. That is to say, the power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it. As the court below correctly pointed out, in the case of a conditional remittitur, "a jury has already awarded a sum in excess of that fixed by the court as the basis for the remittitur, which at least finds some support in the early English practice; while in the second case, no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law."

Emphasizing the distinction between the function of the court and the function of the jury, and distinguishing between conditional reduction and conditional increase of a verdict, MR. JUSTICE SUTHERLAND added:

> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are

questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

MR. JUSTICE STONE was of the opinion that the judgment should be reversed. In this opinion was discussed the scope of review of denials of motions for a new trial, as well as the propriety of reversal of the trial court in the circumstances present. Commenting on the established rules of appellate procedure on such questions MR. JUSTICE STONE said:

I think the judgment should be reversed.

What the trial court has done is to deny a motion for a new trial, for what seemed to it a good reason: That the defendant had given his binding consent to an increased recovery, which the court thought to be adequate, and thus to remove any substantial ground for awarding a new trial. In denying the motion the trial judge relied on two rules of the common law which have received complete acceptance for centuries. One is that the court has power to act upon a motion to set aside the verdict of a jury because inadequate or excessive, and in its discretion to grant or deny a new trial. . . . The other, which is implicit in the first, is that it has power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted and the authority to set aside a verdict which is not within those limits. . . .

As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial. . . .

If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it. But the question remains whether, in exercising this power of review, the trial judge should be reversed.

Attention was then turned to the question whether the Constitution prohibits the trial judges from adopting the practice in question. In approaching this question the language of the Seventh Amendment and its previous interpretation were discussed:

The Seventh Amendment commands that "in suits at common law," the right to trial by jury shall be preserved and that "no fact tried by a jury shall be otherwise reexamined by any court of the United States, than according to the rules of the common law." Such a provision of a great instrument of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, . . . and to safeguard the jury's function from any encroachment which the common law did not permit.

Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.

Following this a review was had of cases in which innovations on the common law procedure in law actions have been approved in the federal courts. Such cases were cited as illustrative of the fact that the Seventh Amendment does not bar novel methods of dealing with verdicts, if they leave unimpaired the function of the jury to decide issues of fact. The action of the trial court here was thought to be consistent with this principle.

If we apply that test to the present case it is evident that the jury's function has not been curtailed. After the issues of fact had been submitted to the jury, and its verdict taken, the trial judge was authorized to entertain a motion to set aside the verdict and, as an incident, to determine the legal limits of a proper verdict. A denial of the motion out of hand, however inadequate the verdict, was not an encroachment upon the province of the jury as the common law defined it. It would seem not to be any the more so here because the exercise of the judge's discretion was affected by his knowledge of the fact that a proper recovery had been assured to the plaintiff by the consent of the defendant. Thus the plaintiff has suffered no infringement of a right by the denial of his motion. The defendant has suffered none because he has consented to the increased recovery, of which he does not complain.

MR. JUSTICE STONE then referred to the language of the Court in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, where it was held that the court might deny the defendant's motion for a new trial upon remittitur of damages by the plaintiff. Urging that the same reasoning is controlling as to the converse of the proposition, MR. JUSTICE STONE said:

All that was there said is equally applicable to the present denial of a motion to set aside the verdict as excessive. The defendant, who has formally consented to pay the increased amount, cannot complain. The plaintiff has suffered no denial of a right because the court, staying its hand, has left the verdict undisturbed, as it lawfully might have done if the defendant had refused to pay more than the verdict. The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.

The minority opinion also stated that the question involved as to what considerations should govern an appellate court in reviewing a discretionary action of the trial court, was unknown to the common law, which provided for no such review. It was argued, therefore, that the English practice in regard to the control of jury verdicts forms no adequate guide for the federal courts. Referring to the inadequacy of this guide, the opinion adds:

If our only guide is to be this scant record of the practice of controlling the jury's verdict, however fragmentary the state of its development at this period, and if we must deny any possibility of change, development or improvement, then it must be admitted that search of the legal scrap heap of a century and a half ago may commit us to the incongruous position in which we are left by the present decision: A federal trial court may deny a motion

for a new trial where the plaintiff consents to decrease the judgment to a proper amount, but it is powerless to deny the motion if its judgment is influenced by the defendant's consent to a comparable increase in the recovery.

But I cannot agree that we are circumscribed by so narrow and rigid a conception of the common law. The Judiciary Act of 1789, c. 20, 1 Stat. 73, which impliedly adopted the common law rules of evidence for criminal trials in federal courts, and which gave to the federal courts jurisdiction of equity as it had then been developed in England, and the state constitutions which adopted the common law as affording rules for judicial decision, have never been construed as accepting only those rules which could then be found in the English precedents. When the Constitution was adopted, the common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it.

* * *

To me it seems an indefensible anachronism for the law to reject the like principle of decision, in reviewing on appeal denials of motions for new trial, where the plaintiff has consented to decrease the judgment or the defendant has consented to increase it by the proper amount, or to apply it in the one case and reject it in the other. It is difficult to see upon what principle the denial of a motion for a new trial, which for centuries has been regarded as so much a matter of discretion that it is not disturbed when its only support may be a bad or inadequate reason, may nevertheless be set aside on appeal when it is supported by a good one: That the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict.

THE CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE CARDOZO concurred with MR. JUSTICE STONE.

The case was argued by Messrs. David H. Fulton and Leo M. Harlow for the petitioner. Mr. John G. Palfrey submitted the cause for the respondent.

Practice in Supreme Court—Writ of Habeas Corpus—Necessity for Application to State Court Where Ground Is Denial of Due Process by a State

An original writ of habeas corpus will not be issued in the Supreme Court for the release of a prisoner from custody, where the ground for release is that the prisoner is restrained of his liberty by a state without due process of law, in the absence of a showing that an application has been made to the state court on such ground.

Mooney v. Holohan, 79 Adv. Op. 347; 55 Supreme Ct. Rep., 340.

In a *per curiam* opinion, the Supreme Court denied leave, without prejudice, to Thomas J. Mooney, to file a petition for an original writ of *habeas corpus*. The petitioner charged that he is unlawfully held in prison by the State of California following his conviction, in February, 1917, of murder in the first degree. He was sentenced to death, but the sentence was commuted to life imprisonment. Application for the writ was made previously to the Federal District Court of Northern California. That court dismissed the writ on the ground that the petitioner had not exhausted his legal remedies in the state courts. Applications to Judges of the Circuit Court of Appeals for allowance of an appeal were denied.

The grounds for the application were stated in the opinion as follows:

> Petitioner charges that the State holds him in confinement without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The grounds of his charge are, in substance, that the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. He alleges that he could not by reasonable diligence have discovered prior to the denial of his motion for a new trial, and his appeal to the Supreme Court of the State, the evidence which was subsequently developed and which proved the testimony against him to have been perjured. Petitioner urges that the "knowing use" by the State of perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process of law. Petitioner further contends that the State deprives him of his liberty without due process of law by its failure, in the circumstances set forth, to provide any corrective judicial process by which a conviction so obtained may be set aside.
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> In support of his serious charges, petitioner submits a chronological history of the trials, appeals and other judicial proceedings connected with his conviction, and of his applications for executive clemency. He sets forth the evidence which, as he contends, proves the perjury of the witnesses upon whose testimony he was convicted and the knowledge on the part of the prosecuting authorities of that perjury and the suppression by those authorities of impeaching evidence at their command. He also submits what he insists are admissions by the State that the testimony offered against him was perjured and that his conviction was unjustified. In amplication of these statements, he asks leave to incorporate in his petition, by reference, the voluminous details of the various proceedings as they were presented with his petition to the District Court.

In response to a rule to show cause, the respondent, warden of San Quentin Penitentiary, made return by the Attorney General of the State. The return was in the nature of a demurrer to the petition, and put in issue none of the facts alleged therein. It submitted that the petitioner failed to raise a federal question. The Attorney General, reviewing decisions relating to due process, insisted that the petitioner's argument is vitiated by the fallacy "that the acts or omissions of a prosecuting attorney can ever, *in and by themselves*, amount either to due process of law or to a denial of due process of law." The Attorney General further argued that if the acts or omissions of a prosecuting attorney "have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* in a denial of due process of law." It was further contended that "it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has that it can be said that due process of law has been denied."

Though denying the application on grounds which will be stated later, the Court nevertheless was unable to approve the Attorney General's contentions as to due process. As to this, the opinion states:

> Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. . . . It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by

intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute State action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature, through its courts, or through its executive or administrative officers."

A review was then had of the many proceedings previously had by the petitioner in the California courts, but it did not appear that relief had been sought in any of them on the grounds urged here. Consequently, the petition was denied, but without prejudice. The Court's conclusion as to this was stated as follows:

> We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. Despite the many proceedings taken on behalf of the petitioner, an application for the prerogative writ now asserted to be peculiarly suited to the circumstances disclosed by his petition has not been made to the state court. Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus*, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. . . .
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> Accordingly, leave to file the petition is denied, but without prejudice.

The case was argued by Messrs, John F. Finerty and Frank P. Walsh for the petitioner.

Copyrights—Damages Provided by Statute for Infringement—Determination by Trial Court

Under Section 25 (b) of the Act of 1909, providing a measure of damages for infringement of a copyright to be applied in lieu of actual damages, it is within the discretion of the trial judge in such a case to fix the damages at the rate of $1 per copy, provided the amount fixed does not exceed the statutory maximum of $5,000, and the trial courts' finding within the statutory limits will not be set aside on the ground that it was an abuse of discretion.

Douglas et al v. Cunningham et al., 79 Adv. Op. 374; 55 Sup. Ct. Rep. 365.

This opinion, by MR. JUSTICE ROBERTS, discussed the extent of damages which may be allowed by the district courts for infringement of a copyright, in the absence of proof of actual damages, under Section 25 (b) of the Act of 1909. The facts disclosed that the petitioner, Douglas, had written an original story which was copyrighted by The American Mercury, Inc. The rights under the copyright were assigned to the petitioner. The respondent, Cunningham, wrote and the Post Publishing Company published in some 384,000 copies an article which was an appropriation of the petitioner's story. The respondents were sued for an injunction, an accounting and award of damages or profits, or in lieu of damages or profits, such damages as the court should find just under the statute. No actual damages could be proved, and the court allowed the maximum damages of $5,000 allowed by the statute, and a counsel fee.

On appeal the Circuit Court of Appeals reversed the decree and fixed damages at $250. On certiorari, this was reversed. The purpose of the statute, and the discretion of the trial court thereunder are set forth in the following portion of MR. JUSTICE ROBERTS' opinion.

> This court has twice construed section 25 (b) in the light of its history and purpose. *Westermann Co. v Dispatch Printing Co.*, 249 U. S. 100; *Jewell-La Salle Realty Co. v. Buck*, 283 U. S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than $250, and no matter how many copies are made, cannot be more than $5,000. In the *Westermann* and *La Salle* cases it was held that not less than $250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just. The question now presented is whether it can be unjust, according to the legislative standard, to use the prescribed measure,—$1 per copy,—up to the maximum permitted by the section. As the *Westermann* case shows, the law commits to the trier of facts, within the named limits, discretion to apply the measure furnished by the statute provided he awards no more than $5,000. He need not award $1 for each copy, but, if upon consideration of the circumstances he determines that he should do so, his action can not be said to be unjust. In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute.

The case was argued by Mr. Cedric W. Porter for the petitioners and by Mr. Edmund A. Whitman for the respondents.

Receivers—Appointment by Federal Courts—Discretion of Court Where State Laws Provide Procedure for Liquidation of Insolvent Corporations

Although the federal courts have power in equity to appoint receivers, on a bill complying with their jurisdictional requirements, the exercise of the power is within the sound discretion of the court, and should not be exercised in the case of an insolvent building and loan association or insurance company, over the objection of state officials charged with the duty of liquidating such insolvents, where the state laws provide adequate procedure for liquidation, and the state officials are seeking to perform their duties in conformity with the state statutory procedure.

Pennsylvania v. Williams et al., 79 Adv. Op. 384; 55 Sup. Ct. Rep. 380.

This case involved questions as to the procedure to be followed in the liquidation of an insolvent building and loan association of Pennsylvania. On petition of a non-resident shareholder, filed in the Federal District Court for eastern Pennsylvania, temporary receivers were appointed for the liquidation of the company. No notice was given to creditors, to other shareholders, or to the Banking Department of the Commonwealth. The next day the respondent corporation, Mortgage Building and Loan Association, filed its answer admitting the material allegations of the bill. The Secretary of Banking informally requested the court not to make permanent the appointment of receivers and to allow the property to be surrendered to the Secretary, for liquidation and administration pursuant to the state statutes. Later the Commonwealth asked leave to intervene, and sought an order directing surrender of the assets of the Association to the Secretary of Banking. The petition contained allegations setting forth the state statutory procedure prescribed for the liquidation of insolvent building and loan associations.

The District Court denied the petition of the Commonwealth, and appointed permanent receivers, treating the case as one involving rival claims of a state and federal court to jurisdiction over the same subject matter and property. The Circuit Court of Appeals affirmed.

On certiorari the cause was reversed by the Supreme Court, in an opinion by MR. JUSTICE STONE. The contentions of the Commonwealth were (a) that the federal court had no jurisdiction to direct the liquidation in a suit brought against the corporation by a

(*Continued on page* 249)

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

HARVARD LEGAL ESSAYS written in Honor of and Presented to Joseph Henry Beale and Samuel Williston. 1934. Cambridge: Harvard University Press. Pp. xviii, 553.—Beale and Williston, in whose honor this volume of Essays is written, are two of the greatest lawyers in the United States; and the volume starts with short and interesting memoirs of them. Then come the sixteen essays written by some of their present and former colleagues and former students; and the volume closes with a list of Beale and Williston's writings. The list of Beale's books shows his amazing versatility—"he has taught almost every subject in the law school curriculum, and his fertile and ingenious mind has left its mark on every subject which he has taught." He has also been a tower of strength to successive administrations of the Harvard law school. But there is no doubt that it is his work on the Conflict of Laws which constitutes his main title to fame, and has given to him his world-wide reputation. Williston has made his name as a great teacher—"for a generation he has by common consent held first place among American teachers of law;" and the greatest living exponent of commercial law and the law of contract. His drafts of Acts to make uniform the law on negotiable instruments, sales, and other branches of commercial law, have proved to be some of the most successful pieces of American legislation; and his book on Contracts, and his work on the Restatement of the law of Contracts, are two of the greatest additions to the literature of American law which have been made in modern times.

The Essays cover a wide field, and are worthy of the two great lawyers to whom they are presented.

The first essay on *Protection against Indirect Attack* by Morton Carlisle Campbell acutely analyzes, from a jurisprudential point of view, relations, such as the relations of principal and surety, in which the need to protect the rights of the principal necessitates his further protection against indirect attack, and so affects the law as to the position of the surety or other third person. Zechariah Chafee gives us a most entertaining paper on Professor Beale's ancestor who came to America in 1640, and his largely successful efforts to assert his claim to property in America which was challenged by English relatives. Edwin Merrick Dodd's essay on *The First Half-Century of Statutory Regulation of Business Corporations in Massachusetts* is a real contribution to the history of an important branch of commercial law. It is interesting to note that such requirements as the subscription of a substantial minimum capital for banking corporations, the provision of general clauses which must be part of all charters, and a measure of limited liability for certain corporations, appear in America earlier than in England. Manley Ottmer Hudson gives us an interesting analysis of the sources of the law applicable in the Permanent Court of International Justice. To the student of the literature of the law the most interesting essay is *The List of Legal Treatises printed in the British Colonies and the American States before 1801*, which has been compiled by Eldon Revere James. It enables us to estimate the relative importance of the English and the American contribution to the law which was being administered in America. James McCauley Landis's essay on *Statutes and the Sources of Law* emphasizes the need for a new approach on the part of the legal profession to the enacted law. He points out that whilst "under the influence of great law teaching a national attitude toward the common law has arisen to counterbalance the centrifugal force of many states," "even the idea that the same spirit can control legislative law is wanting;" and that "the task of its development promises to be a chief concern of tomorrow."

Sayre Macneil, in a very amusing essay on *Some Pictures Come to Court*, gives us some account of the case of *Du Bost v. Beresford*, tried by Lord Ellenborough in 1810, which turned upon Du Bost's picture "La Belle et la Bête," of the Whistler litigation in Paris in 1897 and of the litigation in the circuit court and the Supreme Court over some circus posters in 1903. John MacArthur Maguire contributes an interesting essay, entitled *Taxing the Exercise of Natural Rights*, upon the fluctuations of judicial opinion on the question of what taxes are unconstitutional, because they are taxes upon "natural" or "common" rights. Edmund Morris Morgan's essay on *Federal Constitutional Limitations upon Presumptions Created by State Legislation* raises another constitutional question—When will the creation of such a presumption amount indirectly to legislation, which may be questioned as contrary to a provision of the constitution? Dean Pound gives us an illuminating account of *Twentieth Century Ideas of Law;* and, at its close he advocates that "engineering interpretation" of law which he has expounded in his *Interpretations of Legal History*. It should be noted that if the engineering analogy is to be followed it makes for a certain measure of healthy conservatism. Just as there are certain laws of mechanics which no engineer, whether medieval or modern can disregard, so there are certain basic legal principles which no changes in social or economic conditions can vary. This fact is sometimes forgotten by some social and juristic speculators, as can be seen by some of the theories of criminal liability which Francis Bowers Sayre discusses in his essay on the *Present Signification of* Mens Rea *in the Criminal Law*. Joseph Redlich has written a most suggestive essay on *Sovereignty, Democracy and the Rights of Minorities*, in which the important question of the effect

upon the doctrine of sovereignty of the need to safeguard these rights is discussed. "It is undeniable," he says, "that the progress of acknowledgment of minorities as bearers of 'collective' rights against the legislation and government of their states means a momentous change in the classical concept of the state and its sovereignty as it has been developed since the age of the Renaissance in Europe and a change in the science of politics since Aristotle." The problems to which *Protective Trusts* gives rise are discussed by Austin Wakeman Scott. Because the protection given by these trusts is more extensive in America than it is in England, it has given rise to some difficult problems which the English courts have not been called upon to face. The ethical basis and the practical necessity for the doctrine of *Respondeat Superior* is discussed by Warren Abner Seavey. The spread of the principle is noted; and, from an historical point of view, it is interesting to note that it is bringing back a reversion "to the primitive rule by which liability for harm, at least of certain types, is not dependent upon legal or moral fault." But the author is wrong when he says that in England the liability of the master for the acts of the servant is practically the same as that of an employer for the acts of an independent contractor. James Bradley Thayer has written a learned and subtle essay on the jurisprudential aspects of *Unilateral Mistakes and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*. Edward Sampson Thurston's essay on *Trespass to Air-Space* is a valuable discussion of the common law rules, and of the methods by which those rules are being adapted by courts and legislatures to the new phenomenon of the aeroplane.

This summary description of the varied contents of this volume proves my statement that it covers a wide field. The treatment of these varied topics reaches so high a standard that it is safe to say that it ought to be on the shelves of all lawyers whether teachers, students, or practitioners.

W. S. HOLDSWORTH.

All Souls College, Oxford.
January, 1935.

Gilbert's Collier on Bankruptcy. 1934. Albany, N. Y.: Matthew Bender & Co., Inc.—The third edition (1934) of Gilbert's *Collier on Bankruptcy*, recently received, is disappointing. One gets the impression that in order to bring *Collier* up to date, the publishers have included in one volume of nearly 1,900 pages all of the material in the earlier editions and merely added the text of the very important amendments passed in 1933 and 1934, followed, to be sure, by some explanatory comment, but this in the main is a mere summary, or a restatement of the amendments in altered language.

The first 1,306 pages are devoted to the Bankruptcy Act as it existed prior to 1933. The footnotes in this portion contain some new citations, but very little change in text. Pages 1431 to 1681 contain nothing but general orders and forms, official and supplementary, but the only forms applicable to the recent amendments are a few official forms for use under Sections 74 and 75, the original *Debtor Relief* sections, and a very few supplementary forms that might be used in *Agricultural Corporation* cases (section 75), but none for cases of general extensions under Section 74. No forms of any kind appear for railway reorganizations (section 77) or corporate reorganizations (section 77-B) or municipal-debt readjustments (section 80). Pages 1683 to 1854 contain the general index.

This leaves pages 1307 to 1430 devoted to those admittedly vital portions of the law that have been added during the last two years and concerning which most lawyers are seeking enlightenment. I regret to say it is not to be found in these pages. Not only are there practically no citations, but there is no adequate analysis of the various statutory provisions, and virtually no historical or philosophical discussion of these amendments, which might, in the absence of decided cases, prove of some value to courts and lawyers in construing them.

Many decisions have been reported and much discussion has appeared in the periodicals, of far more value to the profession than the somewhat innocuous comments that follow the reprint of Chapters VIII and IX of the United States Code, better known as Chapters 73 to 80, inclusive, of the Bankruptcy Act.

This and the absence of any helpful suggestions as to new forms are my chief grounds of criticism.

HAROLD F. WHITE.

Chicago.

Restatement of the Law: Torts. By American Law Institute. 1934. St. Paul: American Law Institute, Publishers. 2 Vols. Pp. xxxii, 730 and xxxi, 731 to 1338.—In June, 1923, the American Law Institute began work on the restatement of torts. It contemplates the preparation of four or five volumes. Two volumes have been completed and published to date. One volume deals with "Intentional Harms to Persons, Land and Chattels." The second volume bears the title "Negligence." The work has been done under the direction of Professor Francis H. Bohlen of The University of Pennsylvania. His assistants, or advisers, as they are called in the introduction, included practicing attorneys, judges and professors. Drafts of portions of the restatement were prepared and later discussed at conferences. Thereafter these drafts were revised in the light of these discussions and when no further revision was considered necessary they were approved for publication by the council of the American Law Institute.

Most of the actual work of drafting the text of the restatement was done by the reporter and certain of his assistants from the professorial group.

The result is 1,300 pages bound in two volumes and containing 503 sections, printed in black letter, which may be considered the text of the restatement on the topics covered. Each section is followed by comment and in many instances the comment is followed by illustrations. These illustrations consist of fact statements. These appear as hypothetical cases, but many of them are familiar as being closely parallel to well-known cases. However there are no references to the cases which inspired the illustrations.

A review of a law book within the space ordinarily available is almost bound to be inadequate; the review of a work like this, purporting to be a coordinated articulation of the rules of law covering a great field, is particularly so. When a book undertakes to declare what the rules of law are or ought to be, and to give those statements the authority of a body of prominent experts, it is inevitable that there will be many who will dissent. The restatement has its enthusiastic supporters and its earnest, conscientious critics. While the writer dissents from the form in which the restatement expresses certain propositions this brief review affords no opportunity to discuss particular points. It would seem

more appropriate here to raise the question, "Should the law of torts be restated?" Is it wise or indeed possible to cast in rigid form the principles of the law of torts? If there is any portion of the law which always has been and will continue to be in a state of flux it is the law of torts. Changes in social structure and social norms are so many and come about so rapidly that one may well question the desirability of attempting to influence bench and bar to accept a quasi-authoritative body of rules that will tend to make static the rights and duties that make up this portion of the law. Should not the process by which government undertakes to regulate the duties which the social conscience imposes in the complex association of individuals in organized states be free to grow, develop, expand or contract, and change in form and emphasis with changing social needs? That this process will go on in spite of the restatement has already been shown by cases decided in jurisdictions and by courts very familiar with the restatement. Such cases have already gone beyond the duties imposed in the relevant sections of the restatement and have recognized rights and enforced duties which, in view of the authorities already in the books, must have been intentionally omitted from the restatement.

It will be impossible within the length of this review to illustrate the point just made, or to discuss in detail any of the 503 sections of the torts restatement. It has already been the subject of considerable comment. Dean Leon Green of Northwestern University Law School in an article in the January issue of the Illinois Law Review has made a searching analysis of certain very important sections of the restatement. The temptation to quote numerous incisive statements from this article is very great, but must be resisted. An Englishman's view of the torts restatement is found in the February issue of the University of Pennsylvania Law Review, written by Arthur L. Goodhart, professor of jurisprudence at Oxford and editor of The Law Quarterly Review. The most ambitious supporting commentary of the torts restatement appeared about two years ago in the form of a treatise on the law of torts written by Professor Harper of the University of Indiana and one of the advisers to the reporter.

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Restatement of the Law of Conflict of Laws, as Adopted and Promulgated by the American Law Institute, at Washington, D. C., May 11, 1934. American Law Institute, Publishers: St. Paul, 1934. pp. xli, 814.

The issue of the final form of the restatement of the Conflict of Laws by the American Law Institute is a matter of the highest importance for all practitioners and students of this branch of law not merely in the United States, but also in all the British dominions in which the common law holds sway. Moreover, it concerns even those territories such as Quebec, Ceylon, or South Africa in which a different system of law prevails, for the Privy Council as the final arbiter inclines to apply to all law districts the doctrines of the Conflict of Laws as observed in regions subject to the Common Law. The restatement has the peculiar value that it is based on the expert labors of men who have for many years been widely known and respected as authorities on the subject; the names of Joseph H. Beale and Herbert F. Goodrich and of their assistants afford assurance of sound analysis of principles and the utmost care in study of authorities. Curiously enough, despite the constant possibility of conflicts in the United States, the case law is disappointingly meagre, and there is surprisingly great discrepancy of views even on fundamental issues. The way has thus been left open for much constructive thinking, and the restatement reflects great credit on all concerned with its production. For the British Empire it has the special value that it presents in condensed form the essentials of American authority, and that it provides suggestions for the solution of many issues which are not covered by any judicial authority in English law. Even when it is improbable that English courts could, consistently with principles implicit in judgments of the two final courts for the Empire, the House of Lords and the Judicial Committee of the Privy Council, accept American decisions, it is always instructive to have knowledge of what has commended itself to the courts and jurists of the United States.

In some matters it must frankly be admitted that American decisions have adopted simpler doctrines than prevail in England. The controversy, which for no very obvious reason is so hotly waged in England on the issue of the renvoi (in any case rather a misnomer), is solved in America by the simple rule that, when under the doctrines of Conflict of Laws the law of another state is held applicable, that law is understood to be the law applicable to the matter in hand, and does not include the rules of Conflict of Laws of the foreign state (pp. 11, 12). Two exceptions are allowed. The rule that the law of the state where land is situated governs matters of title, e. g. the validity in point of form of a will or a conveyance, includes in that law the rules of Conflict; and questions as to the validity of a decree of divorce are decided according to the law of the state of domicile of the parties, including that state's rules of Conflict. Both these doctrines (pp. 13, 14) are in entire agreement with English law. But American jurisprudence is spared the difficulty which English law, as once more asserted in *Re Ross* (1930) 1 Ch. 377 and *Re Askew* (1930) 2 Ch. 259, has to face, whenever it is held that a British subject has died domiciled e. g. in France or Italy. The only way out for an English court is to obtain expert evidence of the treatment which would be applied by the appropriate local court.

American law is more generous than English to the minor and married woman as regards the acquisition of an independent domicile. English law still seems to negative the possibility of a minor acquiring an English domicile, even if the law of his domicile would permit such action (Dicey & Keith, *Conflict of Laws* [ed. 5] p. 99), and the doctrine is now definitive that a married woman's domicile must be that of her husband (ibid, p. 107). There is much to be said for the American doctrine that a wife who lives separate from her husband without being guilty of desertion can have a distinct domicile (pp. 52, 53). While divorce jurisdiction as exercised in the United States (pp. 170-2) seems to English lawyers too wide, it is certainly fortunate that it can give relief in the forum in which the husband and wife were last domiciled together. It is impossible to defend the doctrine that a wife deserted in England, whose husband proceeds to settle in Canada or Australia, cannot obtain a divorce if her husband has obtained a domicile in Ontario or Victoria. It is true that the difficulty may be evaded by the court accepting the view that the husband has not changed his domicile, but in some cases at least it is perfectly clear that this assumption is unjustified. Moreover, the law of England, having decided that domicile affords the only test of the forum, has had to

undo the effect of its own action in certain peculiarly inconvenient cases by legislation allowing the courts of India, and certain colonies, where European residents are numerous, to grant divorces of persons domiciled in England. Still less defensible is the English rule which points to restricting decrees of nullity of marriage to the court of domicile: much may be said for the wider view of American law (pp. 173-5). There is much also to be said in favor of the rule (p. 628) that a court will not order distribution of the free balance of an estate under its control in administration, if it is shown that there are unpaid claims available against the estate in other states, unless the payment of such claims is provided for. Unfortunately there is English authority (*Re Lorillard*, [1922] 2 Ch. 638) which allows distribution of English effects despite the fact that in the state of domicile, New York, there were outstanding valid claims against the estate there which could not be satisfied. It is perfectly true that the claims in question were time-barred by English law, and could not be proved in England, but they were admittedly valid in the state of the decedent's domicile, and clearly justice to creditors should have been preferred to generosity to beneficiaries. Nor can it be doubted that American law has the advantage of English in its treatment of claims made in one state based on a tort committed in another. The rule (pp. 457 ff.) that the extent of the right is wholly dependent on the quality of the action impugned under the law of the state in which the wrong was done seems irresistible, but in England the case of *Machado v. Fontes* (1892) 2 Q. B. 231, which only the House of Lords can overrule, permits action in England where no action would lie in the state in which the alleged tort was committed. Yet even American law is unsatisfactory in that it permits an action for a tort committed in one state to be brought in another state, even when the law of the first state prescribes a definite period within which action must be brought therein in respect to the wrong (p. 721). It would seem far more natural to hold that a statute limiting action to a definite period should be construed as operating thereafter as an act of indemnity, which under English law would have the effect of rendering action in England impossible (*Phillips v. Eyre* (1870) L. R. 6 Q. B. 1).

In conclusion one or two minor points may be questioned. In the British Empire the chief state in the political sense is not Great Britain (p. 5), but the United Kingdom of Great Britain and Northern Ireland, which still exercises complete authority for international purposes over all the Empire, except Canada, Australia, New Zealand, the Union of South Africa, and the Irish Free State. The provinces of India are not at present separate law districts, like the provinces of Canada. It may be doubted whether an English court would undertake the duty of declaring the legitimacy of the son by a second wife of a Muhammadan British subject who has acquired English domicile after marrying under his personal law four wives while domiciled in India (pp. 70, 71). It is true that English law is gradually coming to recognize that certain effects of polygamy cannot be evaded, but the jurisdiction as to declarations of legitimacy (Dicey & Keith, pp. 301-6) was clearly intended to deal with Christian marriages, and the courts are not anxious to undertake decisions on issues which concern marriages of a very different type (ibid. pp. 281, 548).

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Leading Articles in Current Legal Periodicals

Columbia Law Review, January (New York City)—Prologue to Nomostatistics, by George H. Jaffin; Nicknames and Unfair Competition, by Charles Pickett.

Michigan State Bar Journal, February (Ann Arbor, Mich.)—Some Comments on Police Administration, by James K. Watkins; Constitutional Amendment for Appointment of Judges Defeated; Creation of Government Corporations by the National Government, by Maurice S. Culp; The Delegation of Federal Legislative Power to Executive Officials, by Theodore W. Cousens; Foreign Enforcement of Actions for Wrongful Death, by William H. Rose.

Harvard Law Review, February (Cambridge, Mass.)—Some Observations on Preparatory Work in the Interpretation of Treaties, by H. Lauterpacht; Retroactive Federal Taxation, by Frederick A. Ballard; Two Cases on Jurisdiction, by Joseph H. Beale.

Mississippi Law Journal, February (University, Miss.)—State Taxation of Interstate Sales, by Charles L. B. Lowndes; Law of Waste in Mississippi Territory and State, by T. C. Kimbrough; A Re-examination of Our Legal Rights, by Wex S. Malone; National Housing Act, by Ernest P. Jones, Jr. Illegal Considerations in Negotiable Instruments, by Vardaman S. Dunn; The Need to Simplify the Formal Requisites of Contracts in Mississippi by Revising the Doctrine of Consideration and the Statute of Frauds, by J. B. Hutton, Jr.

California Law Review, March (Berkeley, Cal.)—Corporate Capital and Restrictions Upon Dividends under Modern Corporation Laws, by Henry W. Ballantine and George S. Hills; Priority of Tax and Special Assessment Liens, by J. C. Peppin.

Virginia Law Review, March (University, Va.)—Government Proprietary Corporations, by John Thurston; Federal Procedural Revision, by George H. Jaffin.

Minnesota Law Review, March (Minneapolis, Minn.)—Constitutional Problems Arising from Service of Process on Foreign Corporations, by Maurice S. Culp; Rights of Preferred Shareholders in Excess of Preference, by Jonathan H. Rowell; Rules Governing the Allowance of the Privilege Against Self-Incrimination, by Max P. Rapacz.

United States Law Review, February (New York City)—Public Opinion and the Legal Technique, by F. R. Aumann.

Yale Law Journal, January (New Haven, Conn.)—A New Federal Civil Procedure—I. The Background, by Charles E. Clark and James Wm. Moore; The Corporate Entity and the Income Tax, by Maurice Finkelstein.

Yale Law Journal, February (New Haven, Conn.)—Legislative Changes in the Law of Equitable Conversion by Contract, by Sidney P. Simpson; Jurisdiction to Tax—Another Word, by Maurice H. Merrill; The Legal Philosophy of Roscoe Pound, by William L. Grossman.

Texas Law Review, February (Austin, Tex.)—Imputed Contributory Negligence, by W. Page Keeton; Statutory Lien on Current Production of Oil and Gas, by Leroy Jeffers.

Illinois Law Review, March (Chicago, Ill.)—Constitutional Issues of the Federal Power Program; by E. F. Albertsworth; The Inappropriate Forum, by Joseph Dainow; Claims Against Closed State Banks in Illinois, by George L. Siegel.

Conflicting Taxation at Second Interstate Assembly

(*Continued from page* 210)

The Interstate Assembly passed a resolution explicitly charging the Interstate Commission on Conflicting Taxation with the organization of such a Council to study the problems of multiple taxation by competing units of government and the closely related problem of determining the functions that can best be performed by the federal government and those that more properly fall to the states and their subdivisions. In its resolution the Assembly proposed that the Commission might well utilize the plan it had itself suggested, but it assigned to the

chairman and secretary the authority to modify the plan in the light of conversation with the Secretary of the Treasury and other federal officials.

A companion resolution called for the establishment in each state of a Commission on Interstate Relationships to carry on conferences and negotiations with other states and with the federal government. Adoption of this plan by each state will not only perfect the Council of State Governments, but will provide an appropriate local contact agency which the proposed Tax Revision Council can utilize for developing its plans.

It was the feeling of many of those who attended the Interstate Assembly that the development of plans for a Tax Revision Council was the most significant step taken by the Assembly. The feeling seemed to be general[14] that representation of various levels of government on the Council is essential to the development of satisfactory long-range plans for both improving the allocation of governmental functions and alleviating the tax conflicts among different units of government.

14. Professor Robert Murray Haig's address must be regarded as a definite exception.

LABOR DISPUTES AND THE FEDERAL GOVERNMENT

Persistence of Efforts to Bring Intrastate Labor Relations under Federal Control May Eventually Result in Proposal of a Constitutional Amendment to Authorize It—It Is Therefore Desirable to Consider the Workings of Such a Plan in the Federated Democratic Government of Australia, Where a System of Compulsory Regulation and Decision of Labor Disputes Has Long Been in Operation

By O. R. McGuire

Member of American Bar Association's Committee on Administrative Law

THE Constitution of the United States, as it now exists, leaves little room for doubt that the Federal government does not possess the power to prescribe the hours of labor, maximum or minimum wages, or terms and conditions of employment in intrastate business or industry nor may the Federal government insist that there shall be followed any system of compulsory arbitration of such intrastate disputes. If previous opinions of the Supreme Court of the United States are to be accepted as establishing the law of the Constitution in this respect, it seems equally clear that manufacturing, farming and the bulk of other industries employing labor are intrastate in character.

However, the persistence with which efforts are being made to bring such intrastate labor relations under Federal control through the enactment of various statutes by the Congress may eventually culminate in a proposed constitutional amendment after the Supreme Court of the United States finally sustains the judgments of the lower courts holding unconstitutional or inapplicable Federal statutes attempting to regulate the relations of employer and employee in intrastate business or industry. Therefore, it not only appears appropriate but highly desirable to take a glance at the laws of another federated democratic government—the Commonwealth of Australia—where there has been long in operation a system of compulsory regulation and decision of labor disputes.

At the Federal convention which was held in Sydney in 1891 to discuss the proposed legislative powers to be conferred on the Commonwealth government, Mr. C. C. Kingston proposed that the commonwealth parliament should have power to establish courts of conciliation and arbitration for the settlement of industrial disputes. It was made quite clear in the official report of the debates in this convention that it was the intention of such proposal that industrial disputes confined to one state were to be left to the state concerned for settlement but nevertheless the proposal was defeated. Six years later the proposal was again advanced in the Federal convention held at Adelaide, in 1897, when Dr. Higgins, later Justice Higgins of the Federal Industrial Court, proposed that the Federal government should have power to deal with industrial disputes extending beyond the limits of any one state. He urged that industrial disputes could not always be confined in their evil effects to any one state and that when not so confined, the Commonwealth government was the only government which could cope with them. The proposal was again defeated but he advanced it the next year in the convention held at Melbourne and this time with success, for it was incorporated in the Commonwealth Constitution as section 51, paragraph 35, as follows:

> "The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to—Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state."

This Federal constitutional provision was implemented by the Commonwealth Conciliation and Arbitration Act of 1904, which has been several times amended. The chief objects of the act are set forth in section 2 thereof as being to prevent lockouts and strikes; to constitute a court of conciliation and arbitration; to provide for the exercise of the jurisdiction of the court by conciliation and compulsory arbitration in default of amicable agreement between employer and employees; to enable the states of the Australian Common-

wealth to refer labor disputes to the Commonwealth court; to facilitate and encourage the organization of representative bodies of employers and employees; and to provide for the making and enforcing of industrial agreements.

Section 11 of this act of 1904 provided that the Commonwealth Court of Conciliation and Arbitration should be a court of record, and section 12 provided that the president should be appointed by the Governor General of the Commonwealth from among the justices of the High Court, the Supreme Court of the Commonwealth government, for a term of seven years. Subsequently the High Court held in the case of *Waterside Workers' Federation of Australia v. Alexander, Ltd.*, 25 C. L. R., 434, that since the Commonwealth Constitution provided in section 72 that justices of the courts created by the Commonwealth Parliament should hold office for life and the justice of the Commonwealth Arbitration Court was appointed for a term of seven years, only, such court was incompetent to exercise any judicial power. The result thereof was an amendment of 1926 which provided that the judges of the Commonwealth Arbitration Court should be appointed for life. A prior act of 1920 had changed the title of the presiding judge from president to chief judge with authority in the Governor General to appoint such additional judges as might be required. Only barristers or solicitors of the High Court or of the supreme court of a state of not less than five years' standing are eligible for appointment to the Commonwealth Arbitration Court. Since the 1926 amendment that court has freely exercised judicial powers such as the imposition of penalties for breaches of awards, the interpretation of awards, and the issuance of injunctions or prohibitions.

The states of the Australian Commonwealth likewise have their industrial courts. The Wage Board System was introduced in Victoria in 1895 and the powers and jurisdiction thereof was greatly enlarged in Victoria Act 3677 of 1928. Tasmania had a Wages Board Act in 1910. South Australia, New South Wales, and Western Australia each had an Industrial Arbitration Act in 1912. Queensland had an Industrial Peace Act in 1912 and an Industrial Arbitration Act in 1916. The organization of the industrial tribunals vary somewhat as among the various states of the Australian Commonwealth and it would unduly extend the length of this paper to describe all of them in detail. The one in New South Wales, which is the principal industrial state in the Commonwealth, may be accepted as an illustration of similar organizations in the other states.

The Industrial Commission of New South Wales consists of three members, one of whom is called the President. A person to be qualified for appointment to that commission must be a puisne judge of the supreme court, a district court judge, a barrister of not less than five years' standing or a solicitor of not less than seven years' standing. Appointments are made by the governor. Each member has all the rights of a puisne judge of the supreme court of the state. The commission is a superior court of record and the retiring age of the judges is seventy years. All members must be present at a sitting and decisions are reached by a majority vote. The commission may in a particular matter delegate any of its powers or functions to any one member or to a deputy commissioner appointed by the governor. Appeals lie to the commission from any order of a commissioner or deputy commissioner and the commission may vary such order or award in such manner as it thinks just. The commission may sit with assessors representing the interests of each of the parties before it and may commit to such assessors for determination or consideration and report any issue of fact.

This commission of New South Wales includes among its powers and functions the right to inquire into and determine any industrial matter referred to it by the minister of the state; to hear appeals from any order, determination, or award of a conciliator whose principal work is the making of awards and variations of awards in labor disputes; to determine, after public inquiry, but not more frequently than once in every six months, a standard of living, and to declare what shall be the living wages based upon such standard for adult male and adult female employees in the state; to hear and determine appeals under the act; to confer with any persons or industrial unions as to anything affecting the settlement of an industrial matter; and to summon any person before the commission for the purpose of giving evidence. Also, the commission has power to encourage the proper apprenticeship of minors and to provide for the welfare of juveniles in industry; to acquire and disseminate knowledge on all matters connected with industrial relationship between employers and workers, and to combat the evils of unemployment; to propound schemes for welfare work; to report on prices of commodities, monopolies, trade rings, etc.; to report upon the productivity of industries; to consider and report upon the industrial efficiency of the community; to collect and publish from time to time statistics of vital, social, and industrial matters; and to encourage and assist in the establishment in different industries of mutual welfare committees and industrial councils.

Under the statute any decision of the commission is made final and no award, order, or proceeding of the commission can be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, quashed, reviewed, or called into question by any court of judicature on any account whatsoever. Also, under the statute, inspectors are appointed who may at any reasonable time inspect any premises and any work being done therein; call for and examine time sheets and pay rolls of employees; and examine any employee in regard to wages and hours of labor; and the inspectors are required to report to the minister of the state all breaches of the Factories and Shop Act of 1928 or of any award or industrial agreement which may come to the attention of such inspectors.

That is to say, we find in Australia that the Commonwealth Government, functioning under a Federal constitutional provision, hereinbefore quoted, has established and endowed a Commonwealth Arbitration Court, appointed for life, with vast powers for the settlement of industrial labor disputes extending beyond the limits of any one state and the various state governments have established and endowed arbitration courts under various names for the settlement of labor disputes within the respective states. In other words, Australia has a complete system of Federal and state arbitration courts with jurisdiction far beyond anything heretofore attempted in this country—even beyond the legislation held unconstitutional in *Coppage v. Kansas*, 236 U. S., 14, and *Atkins v. Children's Hospital*, 261 U. S. 525.

What have been the results in Australia?

The Adelaide Chamber of Commerce Bulletin for February, 1934, contains the statement that the position of industrial arbitration in Australia justified the remark of the late Mr. Justice Higgins—the man who succeeded in securing power in the Commonwealth Constitution to establish a Federal arbitration court—with

reference to the "Serbonian bog of technicalities"; that there were Federal and state awards which overlap; that the bases of the different awards vary in different industries on varying costs of living figures computed on different bases; that the interpretation of the Federal constitution and Commonwealth legislation thereunder —which over-rode state legislation—had changed so as to give the greatest operation to the Commonwealth constitution and laws; and that the word "dispute" had been stretched to include cases where the mere exchange of correspondence between employers and a union has been held to constitute a dispute.

The British Economic Mission in its report of January 7, 1929, to the prime minister of the Commonwealth government stated, among other things, that it had consulted with employers and employees and that it was the consensus of opinion that the arbitration courts had not come up to expectations. Also:

"By workmen's representatives, not less emphatically than by representatives of the employers, it has been consistently represented to us that the Arbitration Courts are not achieving their purpose and that a system designed to arrive by judicial decisions at fair and prompt settlement of industrial disputes such as could be freely accepted by both sides must be held to have failed. The most important of the reasons which have been advanced for this view are that experience has shown that there arises between the two parties who appear before the arbitration court judge or arbitrator the spirit of antagonism inseparable from litigation, and that the object of prompt settlement is defeated by the delay occasioned by the necessity for the collection and presentation of detailed evidence in a form acceptable to a court. It is complained that the procedure of the arbitration tribunals occasions the expenditure of much time and money by the litigants, and involves very long absences from their ordinary occupations for a large number of persons whose time might be more profitably employed that the subject matter of the questions which are brought before such tribunals is not of a nature with which judicial tribunals, necessarily unversed in the practical problems of industry or in the economic questions to which they give rise, are best fitted to deal; and that the overlapping jurisdictions of the Federal and State Arbitration Courts have led to an almost inextricable tangle of conflicting decision so complicated that large staffs have to be maintained to keep track of them and to endeavor to guard against involuntary contravention of any of them in the course of everyday business. The indictment of the system of the Arbitration Courts which we have heard is a heavy one; and we feel that it is well founded on many grounds, and particularly on the ground that the system has tended to consolidate employers and employees into two opposing camps, and has lessened the inducement to either side to resort to round table conferences for that frank and confidential discussion of difficulties in the light of mutual understanding and sympathy which is the best means of arriving at fair and workable industrial agreements.

"A change in the method prevalent in Australia of dealing with industrial disputes appears to us to be essential, and we hold that there should be a minimum of judicial and governmental interference in them except in so far as matters affecting the health and safety of persons engaged in industry may be concerned."

The foregoing is the opinion of a British Economic Mission sent out to Australia to make a report respecting the very serious economic and industrial situation then confronting the people of Australia and is thus the judgment of a group of experts wholly detached from the political conditions in that Commonwealth.

With respect to conflicts between the Commonwealth and State Arbitration courts, the opinion of the Supreme, or High Court of the Commonwealth Government in *Whybrow's case,* 10 C. L. R., 266, placed the unions in a happy position. That opinion was to the effect that the Federal Arbitration Court could fix a rate of wages higher than the rate fixed by the applicable state arbitration court with the result that the employees could try their luck with the Federal court with the knowledge that the state rate of wages and conditions of work could not be reduced or made worse and might possibly be increased or bettered. In other words, where both a Federal and a state award or determination of wages and working conditions operate in the one industry the employees are entitled to the higher wages and better working conditions in whichever award they are prescribed. In a subsequent case of *Clyde Engineering Company, Ltd., v. Cowburn,* 37 C. L. R. 468, the High Court held that the state legislatures could not fix or authorize the state arbitration courts to fix a rate of wages or prescribe working conditions inconsistent with those fixed and prescribed in the award of the Federal Arbitration Court.

A result of such a conclusion of the High Court is stated in the above referred to bulletin of the Adelaide Chamber of Commerce with respect to rates of wages fixed by the Federal Arbitration Court in a recent textile award. That award prescribed a flat rate of pay for all woolen mills, throughout the Commonwealth. Prior to that time the rates of wages in such mills had been fixed in the various states on the basis of the different costs of living in such states but due to an allegation that such industry was highly competitive, it was concluded to make the rate of wages uniform. The Chamber said:

"Such an award is based upon entirely wrong premises, and unfortunately the employers in the smaller States concerned, in endeavoring to obtain exemption, had to fight not only the union leaders, but also the lawyers of employers of the Eastern states. Industry in the smaller states can not long continue to stand up to the competition of manufacturers in the more populous states who have the benefit of a large home market."

The labor unions make no secret of the fact that they prefer the Federal arbitration court to the state courts or boards. The vice-president of the Australian council of trade unions (representing some 500,000 workers) is reported to have testified on March 19, 1928, before the Royal Commission on the Commonwealth Constitution that he considered it was essential that the Federal parliament should be given unrestricted power to deal with the problems of capital and labor throughout the country, whether inter- or intrastate in character and that to allow thirteen differently constituted legislative bodies to deal with the problem in piecemeal was only courting disaster. On the other hand, Justice Brown said in the *South Australian Living Wage case for the Tinsmiths,* 1 S. A. I. R. 55, that:

"Most industries in South Australia, however, as in other states, are domestic industries which call for, and should receive, domestic supervision. With regard to such industries, the proximity of the court, with its relative accessibility, and the relative ease with which it is subjected to criticism through one or the other of the various organs of public opinion, make it a more truly democratic tribunal than a centralized tribunal can claim to be, however generous might be its awards. Further, the fact that the local tribunal is more nearly in touch with local industries also serves to justify the maintenance of state industrial control alongside of the federal system. There is a great sphere of useful service for both. But, if the public interest is to be served, there should be no marked divergency between the Commonwealth and state authorities as regards such basic matters as the living wage. I hope the time is not far distant when some arrangement will be made, formal or informal, for co-ordinate action."

While the struggle in Australia seems to be not unlike the struggle in this country between Federal and state rights, the Commonwealth government has been unable to secure the adoption of an amendment to the Federal constitution authorizing the Federal government to take over the control of labor conditions in purely state matters where such control has not been effected by virtue of the two above referred to judgments of the Federal High Court in the *Whybrow* and *Clyde Engineering Company cases.* Such control over

intrastate wages, hours of labor, etc., is very substantial as shown by the award of the Federal Arbitration Court in the above referred to Woolen manufacturing case.

Has such a scheme of arbitration or industrial courts brought about industrial peace in Australia? The answer is decidedly not! The Labor Report for 1932, issued by the Commonwealth Bureau of Census and Statistics at Canberra states that the working days lost during 1932, due to industrial disputes aggregated 212,318 and during 1931 aggregated 245,991 days. The estimated loss of wages during 1932, due to such industrial disputes aggregated £165,582 and for 1931 the sum of £227,731. The number of industrial disputes in 1932, was 127 and the number in 1931 was 134, and in 1932, 32,917 people out of the comparatively small population of 5,435,734 in Australia were engaged in industrial disputes for that year. During the five-year period from 1928 to 1932, inclusive, the said labor report is to the effect that an aggregate of 119,562 persons were engaged in labor disputes with a loss of 7,208,306 working days and £7,330,319 in wages. It is stated by the same authority that the main causes of industrial disputes in Australia are wage questions, working conditions, and employment "of particular classes of persons."

It is thus clear that the arbitration courts have not succeeded in Australia—with all of their vast power to either prevent or settle industrial disputes—and this seems to be due in some measure, at least, to the fact that while an award may be enforced against the employer by fines, such remedy is ineffective against the labor unions when they refuse to accept an award as satisfactory and the members either do not return to work or quit work. The High Court held in the *Waterside Workers' case,* 10 C. A. R. 429, that while an arbitration court may have fixed the minimum wages to be paid, the employees were under no obligation to accept employment at such wages. Even if the employer should succeed in securing a judgment against the union for violating an award by striking for higher wages, such judgments are often difficult if not impossible to collect.

Senator Wagner introduced in the Senate of the United States on February 15, 1935, S.1958 to establish a National Labor Relations Board to be composed of three members which is to be authorized, among other things, "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." It is interesting to compare the provisions of such bill with the laws of the Commonwealth of Australia and its states for the regulation of labor disputes. Assuming for purpose of argument that such a law could be sustained in this country, either without or with an amendment to the Constitution to that end, it is difficult to see what would be the situation in this country with a three judge court to hear industrial disputes. Australia has but a fraction of the population that we have in this country; in fact, the total population of Australia is less than the population of the State of New York and the industries of Australia are comparatively few. Yet, Mr. Charlton, a labor leader in the Commonwealth House of Representatives, stated in a debate of June 8, 1928, that:

"The principal trouble in connection with the Arbitration Court has been caused by the delays in getting claims heard. Some industrial organizations have had to wait for eighteen months or two years before their claims have been brought before the court; the excuse offered for this state of affairs being that there are not sufficient judges to cope with the work."

Senator Barnes, another labor leader, stated in the Commonwealth Senate on June 12, 1928, that:

"As a result of years of experience in the trade union movement, I believe that the greatest factor in fomenting industrial unrest is not a desire of the workers to be everlastingly on strike, but the fact that there is so much delay in having their cases heard by the Arbitration Court... Unionists are prepared to obey the law, but they strongly resent the delays which occur in getting an award from the court."

The system of arbitration courts in Australia with their power to fix wages and hours of labor for all industries may be compared with the Board of Mediation, Boards of Adjustment, and Boards of Arbitration established in this country by the Act of May 20, 1926, 44 Stat., 577,587—at a cost of $125,564 to the Federal treasury for the fiscal year 1935—to consider disputes between the interstate railroads and their employees. While there are many points of difference between the two systems, the principal one is that under the Act of May 20, 1926, the matter is a voluntary one between the railroads and their employees, while in Australia it is compulsory, and would be so here in event S-1958 became law and was sustained.

However, in connection with the power of the Federal government to fix wages and hours of labor in intrastate industry, presumably through the medium of codes of fair competition or under some such provision as section 7 of the act of June 16, 1933, 48 Stat., 198, or the proposed Wagner Labor Relations Bill, Donald R. Richberg, executive director of the National Emergency Council, in a radio address of March 18, 1935, referred to *United States v. Brims,* 272 U. S. 549; *Coronado Coal Company v. United Mine Workers,* 268 U. S. 295; and *Local* 167 *v. United States,* 291 U. S. 293, and said:

"The last stronghold of an irreconcilable opposition appears to lie in legalistic arguments over the powers of the Federal government. Here again public opinion is confused by sound and fury emanating from the bench and bar, instead of light. When judges and lawyers loudly proclaim that the power of the Federal government to regulate interstate commerce does not authorize the regulation of manufacturing and mining or trade within a state, they are not stating the law. They are simply dodging the law, and repudiating the express and repeated rulings of the Supreme Court of the United States. . . . The quibblers and evaders of the law should not be allowed to confuse opinion as to the power of the Federal government to restrain unfair competition in business practices or in labor conditions for the protection of interstate commerce. There is no question of the power. There is only the question of how and where that power should be most widely exercised."

It seems to me that in this connection the history and achievements of the Australian Arbitration Courts of the Commonwealth government as well of the various states in that Commonwealth should be carefully considered in this country.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Biltmore Hotel, Los Angeles, California, beginning Tuesday, July 9, 1935.

Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

UNAUTHORIZED PRACTICE OF THE LAW

Duty of the Bar to Make Plain to the Public That the Objection to Unauthorized Practice Is Based on Higher and More Fundamental Grounds Than Self-Interest—Principal Agencies Guilty of Such Encroachments—Some Significant Cases in Which the Question Was Involved—Responsibility of Some Lawyers for Certain Phases of Unlawful Practice — Need of an Independent Bar*

By Fred E. Gleason
President of Vermont State Bar Association, 1933-34

THE subject here to be presented was chosen because it is one on which special attention has been concentrated during the past two or three years by the American Bar Association. In its treatment I intend to have regard more particularly to encroachments upon practice from without, rather than to offenses by members within, the profession, although the latter will receive some mention.

It may be thought that this general subject matter, in the phase which is to be here discussed has little, if any, application to our situation in Vermont. It is true that we are much more fortunate in this respect than are our brethren in metropolitan centers and in other parts of the country but I believe we should all have a better understanding of the reasons for the attention which has been, and is being, given to the matter. In fact I doubt very much if many members of the Bar in Vermont ever have given any serious thought to it or perhaps even been aware of such encroachments as have existed in their own territory.

A special committee of the American Association completed its first year's work with a report on the subject in 1931, wherein it expressed the belief that that Association should be the leader in the uniform application of its standards of conduct as expressed in the Canons of Ethics to the relations between members of the Bar on the one hand and corporations and lay individuals on the other. The activity of the Bar throughout the country in this matter has very naturally been misunderstood and its real purpose misconceived by lay speakers and press. Its purpose has been believed to be the fear of and resentment against competition in the field in which the Bar has always regarded its members as the sole operators.

While as above stated this conception is natural enough, it would seem to be the duty of the Bar, among other things, to make plain to the public that the real objection is based on much higher and more fundamental grounds.

The tendency to undertake the practice of law by lay individuals and groups has not by any means been confined to modern times, although of late it has had increasing ramifications which have brought it more forcibly to attention. As long ago as the fourth century B. C. a group of subjects of the Mikado Kosho formed an association to conduct the business of managing and settling the estates of wealthy Japanese Samurai. As soon as they commenced operations and their purposes became apparent, however, the leaders of the group were rounded up and beheaded on the ground and for the reason that in the view of celestial justice such a group could not possess a conscience and therefore was unfit for such a responsibility. While so direct and violent measures of correction are not recommended, I call your attention to the circumstance to indicate not so much the action as the ground on which it was based. The principle deemed of such importance more than two thousand years ago has remained the same ever since and has the same, and perhaps, with the development and progress of civilization and industrial and social intercourse, much greater, importance now.

It is this principle upon which the organization and activities of the committee above mentioned are principally based, and I purpose to undertake to show the real reasons why the active interest of members of the Bar everywhere should be aroused and their assistance given to the work being done.

A few months ago an editorial appeared in the New York Times commenting on the National Bar Program, and after setting out the four subjects to which the attention of the Bar is being particularly directed said of the one now under discussion:

"Unauthorized practice must appeal to the self-preservative instinct of every lawyer who doesn't have a hand in it. Whether from economic change or otherwise the Bar is subject to many competitors and the introduction of curious elements. According to the retiring President of the American Bar Association the profession has 'suffered immeasurably' in consequence. So here is the strong nucleus of union."

Such an expression is quite typical of the belief on the part of laymen generally. It fails, of course, to comprehend the real and underlying objection. I fear even that some members of the Bar themselves may confine their objection in the same manner and lack appreciation of the deeper, dangerous and more insidious evils which it is sought to correct. Members of our profession need have no hesitancy in admitting their concern at the situation but we should be careful to make plain the real grounds therefor.

The coordination Committee of the Bar Association presented to the Conference of Bar Association Officers at Grand Rapids a plan for closer cooperation among local, state and national associations, not in the thought that evils of long standing could necessarily be corrected by sufficient attention, but that much more progress could be made if

*Presidential Address delivered at the 1934 meeting of the Vermont State Bar Association.

associations of practicing lawyers throughout the country would work together to the common end.

The Bar as a whole, probably has more real interest in unauthorized practice than any of the other subjects which are being given special attention; but if this were the only or the main reason why lay corporations, groups or individuals should not be allowed to practice law, it would be impossible to justify, and certainly to obtain support for the work.

It should be our aim and constant purpose to educate not only laymen, but the members and particularly younger members of our profession, that the public has a far more vital stake than the Bar in preserving the field of law to lawyers. Too much attention cannot be given to clarifying the vital and fundamental proposition that the relation of lawyer and client is a peculiar one which necessitates a single loyalty with a double aspect—loyalty by the attorney to his client always having in view the attorney's obligation to his duties as an officer of the Court. Divided allegiance almost invariably results in advice which is necessarily colored by it, to the detriment of the client.

The public little understands, and still less appreciates, the real conditions under which the activities of the lawyer are conducted; and for this reason alone cannot understand why the same, or at least part of the same, activities may not properly be conducted by lay individuals, groups or corporations. It is not understood or appreciated that the attorney's license to practice is granted by and under the close supervision of the courts and is always subject to control by them.

I can think of no pronouncement by our own court more important for consideration by us than some of those made in the most recent case dealing with one phase of this subject, in the last published pages of 105 Vt. Our court quoted with approval from a Connecticut case the following:

"Admission to the Bar is regulated by rules made, adopted and published by this Court, under statutory authority. An attorney at law is an officer of the court, exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness."

"For the manner in which this privilege or franchise is exercised he is continually accountable to the court, and it may at any time be declared forfeited for such conduct, whether professional or non-professional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney."

Particularly significant as applicable to the subject now under consideration was the further quotation by the court from the same case as follows:

"The power to declare this forfeiture is a summary one, inherent in the courts, and exists, not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession."

Our court then continued:

"The privilege of practicing law is not a vested or constitutional right. It is a privilege burdened with the condition that the possessor of it remains a fit and safe person to exercise it."—In Re: Haddad, 106 Vt. 322, 324, 325.

Among the principal agencies which in some instances have engaged in unlawful practice are Banks and Trust Companies, by the drawing of wills and other legal documents, and in advising with respect to the preparation and subsequent construction and interpretation of the same. Collection Agencies, by instituting actions in behalf of creditors to enforce collections, by advertising the furnishing of legal services and by exacting fees from amounts collected by suit. Trade Associations and Clubs, by rendering legal services and giving legal advice to members of the Club, through an attorney paid by the organization rather than by the client actually served. Land, Title and Abstract Companies, by furnishing title opinions, preparing escrow agreements and doing a general conveyancing business without title insurance.

Credit Associations, by soliciting creditors of an insolvent and by employing to handle claims an attorney on a fixed salary. Property Owners Association, Automobile Clubs and Service Associations, by rendering to their members various legal services through an attorney paid by the Association. Justices of the Peace and Notaries Public, who are not members of the Bar, by giving legal advice and performing small legal services.

Others not entitled to practice law by engaging in office practice.

Among acts which have been held to constitute the practice of law include the drafting of contracts and legal instruments, the handling of bankruptcy and insolvency matters, the giving of title opinions, assessment and condemnation services which involve appearances before judicial or quasi-judicial bodies, the organization of corporations, the probation of wills and administration of estates and the solicitation of divorce business.

Our own court has held, and not so very long ago, in a complaint filed in Supreme Court for contempt, charging respondent with intruding himself into the office of an attorney as follows:

"While an examination of the authorities shows that the line of demarcation between the two classes (criminal and civil contempt) is often shadowy and does not run true, and that the learning on the question abounds with fine and superfine distinctions, the distinction supported by the weight of authorities, and which we believe to be the correct one, is that a criminal contempt is one committed directly against the authority of the court, tending to impede or interrupt its proceedings or lessen its dignity, while a civil contempt is one which operates mainly to deprive another party to a suit of some right, benefit or remedy to which he is entitled under an order of court."

Our court quoted with approval from a Massachusetts case, as follows:

"The punishment of such an offence is solely for the vindication of public authority and the majesty of the law."

Respondent attempted to evade the effect of his conduct on the ground that he did not pretend or represent himself to be an attorney at law. However, on his stationery he advertised himself as an "Accountant — Auditing — Business — Law — Collecting," and many times made out justice writs, some of which he endorsed "attorney" and some as "acting Attorney," and signed communications and notices as "attorney for plaintiff."

Our Court held that the avenue of escape sought was not open to respondent, because the word "Attorney," unless clearly indicated otherwise, is construed as meaning attorney at law, quoting with approval from a Michigan case, the following:

"The word attorney, when used in connection with proceedings of courts, and the authority to conduct business in them, as well as when employed in a general sense with reference to the transactions of business usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification on which the technical and proper sense unite. The legislator and the judge, the lawyer and the layman, understand it alike, as having reference to a class of persons who are by license constituted officers of courts of

justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties, responsibilities and liabilities are devolved by law in consequence."—In Re: Morse, 98 Vt. 85.

In a more recent case, our court, adopting the holding of the Massachusetts court, said:

"At common law an attorney at law has authority by virtue of his employment as such, to do for his client all acts in or out of court, necessary to the prosecution of the suit and which affects the remedy only and not the cause of action."—Brammall vs. LaRose, 105 Vt. 345, 352.

In a case to which reference has been made above, our court said:

"The right to act as an attorney is everywhere recognized as a privilege of a personal nature, not open to all, but limited to persons of good moral character possessing special qualifications ascertained and certified after a long course of study, both general and professional. It is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is usually attested by a certificate of the authority whence derived, and is further evidenced by public records. It cannot be lawfully exercised except by those who have complied with all statutory requirements, and the rules of court relating thereto. * * * In England, the act which gave shape to the matter, and became a model was that of 4 Henry IV, ch. 18, which, among other things, provided, 'that all attorneys should be examined by the justices, and by their discretion, their names shall be put upon the roll.'"

While formerly in this state the Legislature prescribed the requirements for admission these were later abolished, and the Judges of the Supreme Court were given full and absolute authority to make rules regulating the admission of attorneys to that Court, and to the several courts. Other changes followed from time to time, extending the authority of the Judges of the Supreme Court down to 1906 when the present statute was adopted which provides:

"Justices of the Supreme Court shall make, adopt and publish and may alter or amend rules regulating the admission of attorneys to the practice of law before the Courts of this state."—P. L. 1351.

In construing this provision our court has held:

"That the express legislative grant to this Court of exclusive and full authority to determine who shall practice as attorneys before the courts of this state carries with it the implied power to do whatever may be necessary to make such grant effective, even to punishment for contempt those pretending to such office, cannot be doubted. Otherwise the act of the Legislature is nugatory."—Re: Morse (supra).

It is pertinent to inquire what things constitute the "practice of law." I wonder how many members of the Bar have ever sought the answer. There are some decisions which throw light on the subject and may be considered here to advantage.

In 1930 a person was employed in a Minnesota bank as vice president on a fixed salary. By agreement he was also to continue to practice law, not alone for the bank, but generally for others. All fees earned by him in the practice were to go to and be paid over to the bank and become income of the bank. Large sums were so earned and received by the bank. Proceedings were brought by the state board of law examiners for the discipline of the man an attorney. It appeared that a contingent or revolving fund was set aside by the bank for use by the defendant in paying officers' fees and expenses advanced by him for the clients in the law practice, to be returned to the bank and credited to this fund when repaid by clients. This arrangement continued about eight years during which time defendant foreclosed ten mortgages, five for the bank and five for other clients, conducted probate proceedings in twelve estates, and other legal services, the fees for all of which were turned over to the bank as its income.

In sustaining the report of the referee the Minnesota Supreme Court held:

"Neither a corporation nor a layman, not admitted to practice, can practice law, nor indirectly practice law, by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer. For this bank to employ defendant to conduct law business generally for others, for the benefit and profit of the bank, amounted to the unlawful practice of law by the bank, and was misconduct both on the part of the bank and this defendant, who was a participant therein."

The court also held the foreclosure of the mortgages where an attorney's fee is charged as part of the expense and included in the costs, and conducting proceedings in the probate courts in connection with the estates of persons, and persons under guardianship, constituted practicing law; and that an executor, administrator or guardian as such had no right to conduct probate proceedings, except in matters where his personal rights as representative are concerned.

In view of the good character of the defendant, of the fact that no complaints were made as to his conduct towards clients, and of the fact that he was no longer employed by the bank which had been merged with another institution the court severely censured him, instead of either suspending or disbarring him, but said:

"The penalty imposed in this, the first case of this character here, is not to be taken as the measure of the penalty that may be imposed should future similar cases arise after counsel have had the benefit of the views here expressed."—Re: Otterness, 181 Minn. 254; 232 N. W. 318; 73 A. L. R. 1319.

In 1930 also, a proceeding was brought by direction of the board of Bar Commissioners before the Supreme Court of Idaho against Eastern Idaho Loan & Trust Company and others to show cause why they should not be punished for contempt for illegally practicing law. The institution and its president were charged with representing themselves as learned in the law and particularly in the preparation of wills and declarations of trust, soliciting by various types of advertising that they were so able, and advising persons regarding the disposition of their property by will or trust. Advertisements of the institution proclaimed "Wills, Trusts, Guardians, Administrator, Escrow Agreements" and "We make a specialty of drawing Contracts, Deeds and Mortgages. Have you made your Will and provided for the proper handling of your estate after your death? It will pay you to see us about this important matter. We can help you to arrange your affairs so as to save your loved ones expenses and annoyance after your death. Don't defer until after your death what you should do while alive." Notwithstanding the soundness of the advice in the last admonition, the difficulty seemed to be that it was not given by one authorized to give legal advice.

Another advertisement stated "We make business of advising in all such matters, and are specialists in drawing trust agreements, declarations of trust and wills. We make no charge for consultations, come and see us if interested."

In overruling a demurrer to the complaint, the Idaho Supreme Court said:

"Defendants contend that their specially advertised activities do and did not constitute practising law; that they but do and did what hordes of reputable insurance men, realtors and

bankers have been doing for years and what (the statute) authorizes them to do.

"Such work as the mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property, such as a simple deed or mortgage not involving the determination of the legal effect of special facts or conditions, is generally regarded as the legitimate right of any layman. It involves nothing more or less than the clerical operations of the now almost obsolete scrivener. But, where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required; and a charge for such service brings it definitely within the term 'practice of the law.'"

After quoting the sections of the Idaho statutes authorizing trust companies to act in the capacities of guardian, receiver, trustees, executor, etc. the court continued:

"Nowhere do these enactments confer upon trust companies the power to draft wills, trust declarations, or other instruments creating the duties such companies are authorized to 'take, accept and execute.' Their work is purely executive and ministerial, having to do with subject matter in the inception of which they are not and cannot be permitted to participate."

The Idaho Court then cites from Washington the following:

"The right to practise law attaches to the individual and dies with him. It cannot be made the subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance."—State ex rel. Lundin vs Merchants Protective Corp. 105 Wash., 19; 177 P. 694.

"A corporation can neither practise law nor hire lawyers to carry on the business of practising law for it. Though all the directors and officers of the corporation be duly licensed members of the legal profession, the practise of law by the corporation would be illegal nevertheless."—People vs Cal. Protective Corp. 76 Cal. App. 354; Re: Eastern Idaho Loan & Trust Co. 49 Idaho 280; 288 Pac. 157; 73 A. L. R. 1323.

Nearly twenty-five years ago, the New York Court of Appeals dealt with this subject and in a leading case enunciated the reasons which preclude a corporation from practicing law. After naming some of the reasons which have been given above and which have been adopted by our own Court, the New York Court said:

"No one can practise law unless he has taken an oath of office and become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the Bar who have complied with all the conditions required by statute and the rules of the courts. The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practise law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client and he would not owe even the duty of counsel to the actual litigant. * * * The Bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the Bar is an injury to the state."—Re: Co-operative Law Company (1910) 198 N. Y. 479; 32 L. R. A. (N. S.) 55. See also People vs. Merchants Protective Corp. (1922) 189 Cal. 531.

Another observation by the Massachusetts court was concerned with the validity of a contract by which a corporation undertook to maintain a law department, and therefrom to give free legal advice and to perform the services of an attorney in collecting claims when the services of an attorney were necessary. The court held that the corporation by this agreement "held itself out to be lawfully qualified to practice law in the courts of the commonwealth" and upheld an affirmative defense to an action on the contract. (Creditors Nat. Clearing House vs. Bannwart (1917) 227 Mass. 579.)

A similar holding has been enunciated by the Illinois Court of Appeals. (Midland Credit Adjustment Co. vs. Donnelly (1920) 219 Ill. App. 271).

In that case the court said it was an attempt on the part of a corporation to practice law under the disguise of its attorney associate for the very purpose of evading the law regarding professional practice, under which it could solicit collections, which the lawyer was inhibited from doing by legal ethics, and the lawyer could institute legal proceedings and conduct them to a finality, which the corporation could not do.

In 1932 the Circuit Court of Jefferson County, Alabama, issued a decree adjudging the defendant guilty of practicing law without a license in a quo warranto proceeding. The Alabama statute regulated the practice of law; provided who might practice; defined what was practice; required a license to practise; and provided penalties for violations. In affirming the decree the Alabama Supreme Court held that the practice of law is not limited to the conduct of cases in court, but in a larger sense includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court; and cited decisions from Louisiana and Indiana. (125 La. 644; 7 Ind. App. 529). The court further decided that "any advice given to clients, or action taken for them, in matters not connected with the law, is practicing law; and therefore it is practicing law to give advice as to the rights of a person admitted to the chain gang for a failure to pay a fine, and to undertake to procure the acceptance of the fine and the release of such person, citing a South Carolina case (In re Duncan, 83 S. C. 186). Berk vs. State, 225 Ala. 324.

The greater, more responsible and delicate part of a lawyer's work lies in other directions than the conduct of litigation. Drafting instruments, creating trusts, formulating contracts, drawing wills and negotiations all require legal knowledge and the power of adaptation and application of a higher order. The New York court has said that besides these employments "mere skill in trying lawsuits where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of a lawyer's work." (People vs. Title Guarantee, etc. Co., 180 App. Div. 648).

The definition of what constitutes the practice of law as laid down by the Supreme Court of South Carolina in the case above cited was approved and followed by the Iowa Court (Barr vs. Cardell, 173 Ia. 18).

In an Ohio case a mercantile agency incorporated for the purpose, among others, of collecting accounts, received for collection an account of the defendant under a contract by which if suit was not necessary 25%, and if suit were instituted 50%, should be deducted, from collections made; and it was held that the agency could not recover the 50% on collection of a claim by suit, since it was not entitled to practice law and was attempting to collect for legal services. (United Mercantile Agency vs. Lybarger (1930) 28 Ohio N. P. N. S. 319).

In Michigan in 1933 a child was injured by a truck, and a few days thereafter the great aunt with whom the child lived was solicited by a represen-

tative of one Donohue who conducted business under the name Michigan Accident Claims Company to place the claim with him, representing that such person was a lawyer. Papers were signed although their nature was not disclosed in the opinion and soon thereafter suit was brought through another man as attorney, the latter giving notice of claim for a lien for services on settlement, recovery or judgment. A settlement was agreed upon and the case came up for consent judgment on the basis of the settlement, the plaintiff being a minor. The attorney engaged by Donohue to try the case was a little late for the court appointment and before his arrival the great aunt above mentioned had told the court that the case had been solicited. The court notified the Detroit Bar Association of the claim of solicitation and a representative thereof appeared as amicus curiae.

The court then entered judgment for the amount of the agreed settlement, plaintiff's aunt filing a motion for substitution of another attorney which was allowed, and asked the court to determine the amount due the original attorney and the lien on the judgment, objecting to any fees or lien. Fees and lien were disallowed on the ground that the claim had been solicited, in violation of the statute and because Donohue was illegally practicing law.

In affirming the judgment denying fees and lien the Michigan Supreme Court held constitutional the act prohibiting the solicitation of an accident claim and providing that any contract made as a result of solicitation shall be void, and referring to the legislation said:

"The purpose of the act is to discourage the practice commonly known as 'ambulance chasing.' The practice has developed recognized evils, the major of which are (1) fomenting litigation with resultant burdens on the courts and public purse; (2) subornation of perjury; (3) mulcting of innocent persons by judgments, upon manufactured causes of action and perjured testimony, and by settlements to buy peace; and (4) defrauding of injured persons having proper causes of action, but ignorant of legal rights and court procedure by means of contracts which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlement made for quick return of fees and against the just rights of the injured persons. The words of the statute must be read in the light of the evil to be cured."

Relative to the claim that the business conducted by Donohue was not practicing law, the court said:

"The rights and duties arising out of the relationship of attorney and client are not measured by the yardstick of commercial or trade transactions. The relation is purely personal. The lawyer owes to his client undivided allegiance. There is no place in the relationship for its establishment by a middleman, having an interest in the res or control of the procedure. The fact that it is so established or initiated makes the attorney so far the agent of the middleman as to charge him with knowledge of all arrangements under which the middleman assumes to act."

"It probably would be difficult to find a plainer case of (such) illegal practice. In a case in court determination of the steps to be taken and control of procedure and proceedings to enforce the remedy are exclusive functions of an attorney at law, where a party does not appear in his own person."

"To say that, although such misconduct may justify disbarment or contempt proceedings, the court must award compensation to an attorney for services tainted thereby, would put the court in a position of approving or ignoring gross breach of duty to client and court."—Hightower b/n/f vs Detroit Edison Co. Tolonen Appt. 262 Mich. 1; 247 N. W. 97.

Although there is some conflict, it is generally held that agreements between an attorney and a layman to divide attorney's fees, or compensation received by the attorney for business of a third person, are invalid as against public policy, and that no recovery can be had thereunder. See Annotation in 86 A. L. R. 195 and cases there cited.

It has been held that a contract by which an attorney undertakes, in consideration of another's procuring him to be appointed special counsel in certain litigated cases against the United States and to assist in the preparation of such cases, to pay one-half of the fees received from such cases, is contrary to public policy and void, and cannot be enforced against the attorney. Meguire vs. Corwine, (1880) 101 U. S. 108; 25 L. ed. 899. Similar holdings are to be found in California and Minnesota, (86 Cal. 78; 108 Minn. 362).

In the Minnesota case a layman agreed to hunt up and bring to a lawyer persons having causes of action against railroad companies for personal injuries, and in consideration therefor was to receive a division of the attorney's fees. This agreement was held contrary to public policy and void, and the parties being in pari delicto the layman could not recover in an action for a portion of the moneys received by the attorney. Holland vs. Sheehan, (1908) 108 Minn. 362.

In a Nebraska case a similar contract was held void for the same reasons and the layman was denied recovery thereunder. The Nebraska statute, the court held, showed the policy of the legislature to be the absolute exclusion of everyone who had not complied with its provisions relating to the admission of attorneys to practice, from engaging either directly or indirectly in the practice of law in any court of record in the state in any action in which such person is not a party in interest. (Langdon vs Conlin (1903) 67 Neb. 243; 60 L. R. A. 429).

Massachusetts has held similarly: Allen vs Hawks, 13 Pick (Mass.) 79.

So has Minnesota: Gammon vs Johnson (1899) 76 Minn. 76.

I have called attention above to the fact that in some states what constitutes the practice of law is prescribed by statute; and in some there are quite stringent provisions against the practice by persons and corporations not authorized, and also provisions making it a misdemeanor to solicit cases and making void any contract arising therefrom. It might seem wise to give serious consideration to the suggestion that similar statutes be urged in this state; but the committee of the American Bar Association to which the investigation of this subject was specially delegated advises against this. In its report in 1932 the Committee restated the view expressed in the report for the preceding year, that legislation which attempts to define or limit the practice of law or to establish a basis of relationship between lawyers and lay organizations is ill-advised and "provocative of trouble." The Committee stated that much had already been accomplished toward ending unauthorized practices on the part of lay organizations by agreements, by joint declarations of mutually acceptable practices and by discussions and negotiations looking toward a better understanding. It is urged, however, that such agreements and declarations should not undertake to define the practice of law; that neither a Bar Association nor a corporation has any authority to declare what is or is not the practice of law; but that only the state, through its proper tribunal, may decide such questions.

It is further suggested by the Committee that agreements undertaking such definitions are unde-

sirable because they invite compromises in which Bar Associations yield some points in controversy in order to procure an agreement on other points which are thought to be more important, thereby acquiescing in practices which should be opposed, and wherever possible prevented. Such agreements place Bar Associations in the attitude of being willing to agree to unlawful usurpation by lay parties provided lawyers gain some benefits thereby. Surely this is not an attitude to be assumed or countenanced by associations or individual members of the Bar.

The administration of justice is the highest and most sacred function of government. It was William Pitt who said "Where the law ends, there tyranny begins!" As all other functions of government are merely contributory to, and in support of, this supreme purpose; and as the lawyer, by virtue of his license, becomes a public officer—a minister of the state, to aid in the accomplishment thereof, when lawyers undertake to trade and barter with lay organizations with respect to the alleged right of the latter to infringe upon the plain duty of the former, they are aiding to defeat the object and purpose of the state. It is, then, as the standing Committee stated in its report for the current year, *public*-interest and not *self*-interest that is the real basis for the work of the Bar on this subject

The same report points out, as was done in the preliminary statement in a questionnaire sent to associations throughout the country that if law work could be as well accomplished in the interest of the public by laymen, the requirements of honesty, learning and good character would not have been established and insisted upon as conditions precedent to the right to enter the profession. As a matter of fact unauthorized, and therefore unskillful, practice is more apt than not to create business for the lawyer; and if the practice is to be commercialized, then its standards will likewise be commercialized, and the personal and confidential relationship of attorney and client will become a thing of the past.

The view of the Committee, and the view which I have sought herein to emphasize, I find was expressed long ago by Samuel Johnson, who said: "The law is the last result of human wisdom, acting upon human experience for the benefit of the public." I believe you will all agree with the statement of the Standing Committee above mentioned to the effect that the practice of the law as a profession, with all the safeguards that now attend it, is vital to the true administration of justice; and that in the growth of unauthorized practices a real danger to the true administration of justice, and, (the committee might it seems to me very well have added) a real danger to the supreme function of government, exists.

We find, then, that in the country the chief complaints of unauthorized practices relate to the activities of notaries public, justices of the peace, bankers and real estate agents; and in the cities the offenders are corporate fiduciaries, collection agencies, and adjusters of negligence claims. That is a fair statement as to the evils from without. We cannot ignore, however, nor relax vigilance with respect to, the evils from within the profession, some of which have been mentioned herein.

In the permutations and combinations of the alphabet which have recently succeeded the craze for jig-saw and cross-word puzzles I have been expecting to see L. R. A. Not as designating the publications upon which we rely as the source of much of our authority on legal propositions, but a Code authority or an attempt at an administration to govern the activities, prescribe the compensation, and perhaps limit the number or the output of lawyers. Thus far we seem to have escaped, but with the numbers of minds engaged in the pursuit of activities for super-brains, and with the exalted purpose of theorists of every kind and description, who can say whether or when this may become an eventuality?

It is interesting to note that the statement of Principles of Trust Institutions adopted by the Trust Division of the American Bankers Association, and since made a part of the NRA Banking Code, contains the following:

> "Attorneys at law constitute a professional group that perform essential functions in relation to trust business and have a community of interest with trust institutions in the common end of service to the public. The maintenance of harmonious relations between trust institutions and members of the Bar is in the best interests of both and of the public as well. It is a fundamental principle of this relationship that trust institutions should not engage in the practice of law."

In the last analysis it is difficult to successfully deny that almost all unlawful practice involves the services of a lawyer; and that the practitioner who aids or abets the guilty association, agency or individual, as in some of the cases above reviewed, is himself violating the canons of ethics of the profession. No corporation, trust company, title company or protective association performs legal services, as a general rule, except through a lawyer in its employ. If members of our profession were more scrupulously careful in their connections and employment, much of this trouble would be eliminated.

It has been suggested that an indirect method of correction is the improvement in the administration of justice, including simplification of procedure and elimination of delay, so that lawyers may render more effective services to their communities. We all appreciate that efforts to that end have been and are being everywhere made. But coincident to that, and fully as effective and desirable, is the raising of the intellectual and ethical standards of admission to the Bar, as a means of eliminating many offenders or potential offenders in unauthorized practices. While it appears from the exhaustive studies of the Standing Committee which has done such splendid work, that it is inadvisable to attempt a statutory definition of the practice of law, there would seem to be no objection to, but on the contrary every reason for, legislation such as has been adopted in 42 states, prohibiting the practice of law by any but those qualified and admitted under proper supervision of the courts, to do so. It has also been held that equitable relief may be had to enjoin unauthorized practice; but this and many other equally important phases of the matter may not be undertaken within the proper time limits hereof.

An independent Bar is of vital importance to the public, far more so than the public can realize. The Bar has ever been the bulwark of our institutions and the defender of our liberties. From Colonial times to the present members of our profession have never failed to give their time, talents

and ability to any worthwhile public service. Their very training, and the requirements placed upon them for admission and practice give rise to this demand. The Declaration of Independence, the Constitution and Bill of Rights, and the wonderful interpretations placed thereon by the great Marshall are but a few of the most conspicuous examples. An independent Bar, it has been well said, is just as essential to the welfare of the nation as a free press and free speech. Submerge that independence and make the Bar less efficient by being subservient to commercial and predatory interests incorporated to practice law, and our free institutions will have suffered a tremendous if not a fatal blow.

Let us cooperate with all proper efforts to carefully and persistently guard against encroachments from without, not as encroachments upon us as lawyers, but as invasions into and assaults upon the public interest; and let us be equally cautious and vigilant as to evils from within. Thus and thus only, may we merit confidence as a profession, and be entitled to say with Daniel Webster in his famous toast at the Charleston Bar Dinner in 1847:

"The Law. It has honored us. May we honor it."

Review of Recent Supreme Court Decisions

(*Continued from page* 234)

shareholder, since both were subject to the local law, which provides an exclusive liquidation procedure; and, (b) that, in any event, the court in its discretion should have refused to appoint receivers, or, having appointed them, should have directed them to surrender the property of the insolvent corporation to the state officer.

Dealing with these contentions in order, MR. JUSTICE STONE disposed of the first one adversely, and concluded that on the allegations of the bill, the case was within the jurisdiction of the federal court.

The second contention, however, was upheld, and emphasis was placed on the fact that the state statutes provide an adequate procedure for liquidating the property. In this connection, the Court pointed out the propriety of declining to exercise jurisdiction where adequate relief is provided under local laws embodying the domestic policy of the State, and said:

> The question is not the ordinary one of comity between a federal and a state court, each asserting jurisdiction over the same subject matter, and the same property, and where there are shown no special reasons addressed to the discretion of the court first acquiring jurisdiction for relinquishing its jurisdiction in favor of the other. . . . Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, . . . or deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant, . . . would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. . . . It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state. . . . There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers. . . .
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> Here, upon presentation of the application for appointment of receivers, which would involve such an interference, the district judge might appropriately have required notice of the application to be given to the state officers. It was his duty to do so if satisfied that the delay involved in adopting that course would not result in the sacrifice of any vital interest of the insolvent corporation, its creditors or its stockholders. On the showing that their interests would be adequately protected by liquidation under the direction of the Secretary of Banking, the district judge should have denied the application for the appointment of receivers or, if he had already appointed them, should have discharged the receivers, and directed the surrender of the property in their possession to the Secretary in order that the liquidation might proceed under the state statutes.

Accordingly, the decree was reversed and remanded with directions that the property be surrendered to the Secretary of Banking.

In *Gordon v. Ominsky*, No. 395, similar questions were raised and similarly disposed of. There, however, the Court observed that upon the mere allegation of insolvency as set forth in the bill, the district court would have been "well within the exercise of a proper discretion had it declined the appointment of receivers and directed a dismissal of the bill for want of equity."

Penn General Casualty Co. v. Pennsylvania, No. 431, involved somewhat similar questions as to the proper procedure in the liquidation of an insolvent insurance corporation, where the state law makes adequate provision for liquidation. In that case, however, there were conflicting claims of jurisdiction on the part of state and federal courts, and the case came up on certiorari directed to the Supreme Court of Pennsylvania. The latter had sustained the jurisdiction of Pennsylvania Court of Common Pleas to decree the dissolution of the insolvent insurance corporation and to direct its liquidation through the Insurance Commissioner, although proceedings in that court were not instituted until after a bill for the appointment of receivers had been filed in the federal court. Sustaining the jurisdiction of the federal court, by reason of the fact that the bill had been first filed therein, the Court reversed the ruling of the Supreme Court of Pennsylvania. Nevertheless, the Court, in an opinion by MR. JUSTICE STONE, pointed out that the reversal was without prejudice to the Insurance Commissioner to aply to the district court for an order relinquishing its jurisdiction. In regard to this MR. JUSTICE STONE said:

> Although the district court has thus acquired jurisdiction, the end sought by the litigation in the state court is the liquidation of a domestic insurance company by a state officer. In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the district court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer.
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> Since the district court had first acquired jurisdiction to liquidate the property of the insurance company, and had authority to proceed with the cause for that purpose, the supreme court of the commonwealth erred in affirming so much of the decree of the Court of Common Pleas as directed the Insurance Commissioner to take possession of

the business and property of the company, and so far as it affirmed the order of that court which enjoined the company from surrendering its books, records and assets to any person other than the Commissioner, and enjoined others from taking possession of them. The decree must accordingly be reversed and the cause remanded for further proceedings not inconsistent with this opinion, but without prejudice to an application by the Commissioner to the district court for an order relinquishing its jurisdiction over the property of the company and vacating its injunction against surrender of it to the Commissioner for liquidation under the Insurance Department Law of the state.

The case was argued by Mr. William A. Schnader, Atty. Gen. of Pa., for the petitioner, and by Mr. Gordon A. Block for the respondents in No. 394, by Atty. Gen. Schnader for the petitioners and by Messrs. Oscar Brown and Grover C. Ladner for the respondents in No. 395, and by Mr. J. W. H. Henderson for the petitioner and by Atty. Gen. Schnader for the respondents in No. 431.

Current Events

(*Continued from page* 205)

The Committee went over the reports from a number of bar associations and discussed legislation pending in various parts of the country and recent decisions of the courts.

In the matter of legislation, the Committee reaffirmed its previous stand of opposition to any legislation whatsoever which attempts to define what the practice of law is, and authorized its chairman to call the attention of any committees which write him concerning legislation to the recent decisions of the Supreme Judicial Court of Massachusetts, holding that the legislature has no power to pass any bill which will permit practice of law either in court or out of court by any lay agency.

The Committee specifically considered the subject of unauthorized practice as it related to real estate brokers, law lists and law directories, lawyers practicing in states where they are not licensed, corporation fiduciaries and trust companies, bankruptcy practice, corporation organizers, accountants and simulation of process by collection agencies and others.

All members of the Committee were present, including Stanley B. Houck, Chairman, Minneapolis, Minn.; John G. Jackson, New York City; William C. Ramsey, Omaha, Neb.; John R. Snively, Rockford, Ill., Sol Weiss, New Orleans, La.

The committee will meet again in Washington at the time of the American Law Institute sessions in May.

Committee on Professional Ethics and Grievances

The Committee on Professional Ethics and Grievances of the American Bar Association met in Chicago on March 16-17-18. The Committee had a particularly heavy agenda, which it disposed of before adjournment.

A number of opinions were rendered and a joint meeting was held with the Association's Committee on Unauthorized Practice of the Law.

It was decided by the Committee to call a meeting of state and local grievance committee members in Washington, D. C., some time during the week of May 5th, when the American Law Institute will be meeting. At that conference a discussion of effective disciplinary methods will be taken up and specific problems where disciplinary work is required will be dwelt upon.

The following members of the Committee were present: Francis J. Carney, Chm., Boston; Arthur E. Sutherland, Rochester, N. Y.; D. J. F. Strother, Welch, W. Va.; George B. Martin, Catlettsburg, Ky.; George B. Harris, Cleveland, Ohio; Herschel W. Arant, Columbus, Ohio.

California Judicial Council Carries on Successfully in Spite of Inadequate Appropriation

IN spite of the lack of a sufficient appropriation to defray the expense of assigning judges to various parts of the judicial system where their temporary services are urgently required, the Judicial Council of California has employed this well-known efficiency device with considerable success during the past biennium.

It was accomplished by the familiar and never failing recourse to the public and professional spirit of the judges. The details are set out in the Fifth Report of the Judicial Council of California, recently submitted to the Governor and the Legislature. "The Superior Court Judges who served on the several District Courts of Appeal during the past fiscal year," says the Report, "waived the increased compensation to which they were entitled under the Constitution roughly estimated at $10,000. Likewise Justices of the District Courts of Appeal assigned to assist the Supreme Court, and the several justices of the peace and city judges assigned to assist in the Superior and other courts, have generously waived extra compensation in order to provide the needed assistance despite insufficient funds."

The report calls especial attention to the fact that the Act creating the Judicial Council "established for the entire State a unified Court in place of the fifty-eight Superior Courts and four appellate tribunals theretofore assumed to be separate and independent one from another." In other words, it went far beyond the mere creation of a body to investigate and make recommendations. Regarding one of the most significant duties imposed on the Chairman by that Act, the Report says:

"In the discharge of the duty placed upon the chairman to expedite judicial business and equalize the work by making assignment of judges, the powers accompanying that duty have at all times been exercised to meet, as far as possible, the convenience of the members of the bench and to avoid inconvenience to litigants and members of the bar conducting business in the several courts. The number of special assignments has been considerably decreased by reason of two factors: First, the practical elimination of congestion in trial courts by (a) the mobilization of our judicial man-power since the creation of the Council, and (b) the increased jurisdiction in municipal courts and justices' courts as recommended by the Council in 1928, resulting in substantial relief to superior courts in the larger counties, contributed to by reduced filing of new business in the superior court during the three years immediately past; and, second, the disinclination of local authorities in those courts where additional man-power could have been utilized to advantage, to incur the expense incident to an assignment when available funds were low and other demands great."

However, the Report continues, "during the year 1933, the assignments issued numbered 504, and 429 assignments, which included the annual interchange assignments between counties, were issued during the first half of 1934. Since the creation of the Council more than 5,000 assignments have been issued. . . "

Among the definite accomplishments of the Council to which the Report calls special attention are "the formulation, adoption and promulgation of rules for all of the courts of record of the State; the development of the master calendar plan, which is now operating with most gratifying success in the larger courts of the State, notably in Los Angeles County; the plan for the pooling of jurors under which thousands of dollars are being saved monthly (in Los An-

geles a saving of over 44 per cent in the cost of jurors for criminal trials is shown, and an aggregate saving for the last fiscal year of over $150,000); and legislative adoption of our recommendations permitting disposition of uncontested probate matters upon proof by affidavit, dispensing with personal presence of parties, and, in Los Angeles County, permitting one judge to conduct all such proceedings, whereas they previously occupied two."

The Report gives statistics "on the inflow and output of judicial business in all parts of the State, a comparison thereof with earlier reports, and a general summary for the State as a whole." It also presents several legislative items with its recommendation that they be adopted.

Deaths of Members Reported to Headquarters

Andrew R. Sherriff, of Chicago, died in Elgin, Ill., on March 18. Mr. Sherriff was born in Washington, D. C., and received his early education there. He took his law degree from Georgetown University, of which his grandfather, Andrew Rothwell, was a founder. He was admitted to the District of Columbia Bar in 1894, and in 1896 received a graduate degree in law from Harvard University. He was admitted to the Illinois Bar in 1896, and had since practiced law in Chicago. He had been a member of the American Bar Association since 1900, and for some years had been Chairman of the Committee on Cooperation Between the Press and the Bar of the Conference of Bar Association Delegates.

Edwin C. Meservey, of Kansas City, Mo., Mar. 7.

Henry E. Frankenberg, New York City, Feb. 14.

Hon. John B. Abbott, Geneseo, N. Y.

W. H. Bremner, Minneapolis, Minn., Dec. 12.

George E. Thompson, Bangor, Maine.

William Rothmann, Chicago, Ill., Dec. 27.

Pat Johnston, Kissimmee, Florida, Feb. 16.

Jed C. Adams, Washington, D. C., Jan. 29.

A. J. O'Brien, Denver, Col., Dec. 21.

Timon E. Owens, Los Angeles, Cal.

Benjamin S. Grosscup, Seattle, Wash., Jan. 4.

Nathan R. Park, Cincinnati, Ohio, Nov. 22.

Hon. Dennis G. Brummit, Oxford, N. C., Jan. 12.

John H. McCrahon, Syracuse, N. Y., Feb. 15.

Adolph Kurz, Chicago, Ill.

J. F. Keany, New York City, Jan. 7.

James E. Rait, Omaha, Neb., Jan. 9.

Harvey McCourt, Philadelphia, Pa., Feb. 8.

Daniel W. Kaercher, Pottsville, Pa.

Washington Letter

OPEN market operations of Federal Reserve Banks will be directly under control of the Reserve Board itself if a recent change proposed by the administration in the pending Banking Act of 1935 is adopted. This would be in lieu of the Federal Open Market Committee which it previously had been planned to reduce to five members according to the bill as originally prepared, H. R. 5357, S. 1715, the same bill having been introduced in both Houses. Reserve Board Governor Marriner S. Eccles explained that this change is in order to avoid difficulties which might arise from divided authority.

Some of the purposes of the 1935 Banking Act are stated by Mr. Eccles to be: to enable the banks "to contribute more effectively to the acceleration of recovery" by relieving them of "unnecessary restrictions that handicap them in the proper performance of their functions": to "concentrate the authority and responsibility for the formation of national monetary policies in a body representing the nation," and to "modify the structure of the federal reserve system to the extent necessary for the accomplishment of these purposes, but without interfering with regional autonomy in matters of local concern."

"Friends of the new banking act," says Mr. Francis M. Law, "believe that we must have responsible and conscious control lodged somewhere. Washington is preferred to New York."

Some Criticisms of the Measure

Critics of this bill also have had their views stated by Mr. Law, President of the First National Bank of Houston, Texas, and formerly president of the American Bankers Association. In this respect he observes that the framers of the bill must have "had in mind the necessity of quieting the demand for a central bank of a type that would be Government-owned and Government-controlled. Under the new act, the Federal Reserve Board, and particularly the Governor, is vested with many of the powers ordinarily vested in a central bank." It is objected that the Open Market Committee as proposed might easily be subject to the influence of politics and to the influence of private interests; and the question is asked: "Can this power be concentrated in Washington in such a way as to let it be exercised fearlessly and independently?"

Those opposed to the bill further "point out that because of the composition of the Open Market Committee the Government could force Federal Reserve Banks to finance its budgetary needs through their open market purchases of Government bonds and without limit" and that this "might lead to a runaway inflation of the worst kind . . . Senator Glass stoutly protests against what he calls making the Federal Reserve Board a branch of the Treasury."

What This Legislation Proposes to Accomplish

Among the things to be accomplished by this proposed banking legislation, as summarized by Senator Duncan U. Fletcher, who introduced the Senate bill, are the following:

Maximum limit of assessment of one-twelfth of 1 per cent of total deposits is substituted for obligatory stock subscription amounting to 1 per cent of total deposits with liability for repeated assessments thereafter.

Banks not members of the Federal Reserve System are permitted to withdraw from insurance after notice to their depositors and to the Federal Deposit Insurance Corporation. Similarly, after adequate notice and a hearing, the Corporation may terminate the insured status of any bank.

The Deposit Insurance Corporation is given the right to require insured banks to maintain adequate fidelity and burglary insurance.

Qualifications changed for future appointive members of the Federal Reserve Board by providing that they shall be persons well qualified by education or experience, or both, to participate in the formulation of national economic and monetary policies.

Collateral requirements for Federal Reserve notes are to be repealed.

Loans are to be permitted on an amortization basis for 20 years and up to 75 per cent of the value of property. Geographical limitations are removed as to loans on real estate. The aggregate amount of such loans, plus real estate owned (except bank premises) is not to exceed 60 per cent of time deposits or 100 per cent of capital and surplus, whichever is greater.

Double liability of shareholders of national banks is to be terminated July 1, 1937.

Connections of officers, directors and employees of banks with security companies may be controlled by Reserve Board regulations rather than by individual permits.

The Clayton Act is to be amended so that the Reserve Board may supervise

the matter of interlocking directorates through general regulations instead of by individual permits.

Federal Reserve Bank direct loans to private business are to be permitted on adequate endorsement or security instead of requiring both as under present law.

Supreme Court Justices' Retirement Defeated

Permissive retirement of United States Supreme Court Justices was defeated in the House when H. R. 5161 was called up by the Chairman of the Judiciary Committee, Congressman Hatton W. Sumners.

It was proposed to extend to the Supreme Court Justices the same right to retire on full salary as now possessed by Judges of the Federal District Courts and Circuit Courts of Appeals, and to do this by amending Section 260 of the Judicial Code (U. S. C. Title 28, Section 375), as heretofore amended by Act of March 1, 1929 (45 Stat. L., ch. 419, p. 1422). Justices of the Supreme Court, as well as Judges of the other United States courts, who may resign after ten years of service and having attained the age of seventy years are now paid the same rate of salary which they were receiving at the time of resignation. But the provision therefor is statutory and hence subject to change at any time.

The proposed amendment, if it had been enacted, would, it was said, have made retired Justices secure in the salary they were receiving at retirement since they would have continued to be Justices, but retired "from regular active service on the bench" and the President thereupon would have been "authorized to appoint a successor." That the salaries of retired Judges of the lower Federal courts may not be reduced by such legislation as the recent "economy acts" was established by Booth v. United States, 291 U. S. 339. There is now no statutory provision for the retirement of Justices of the Supreme Court, the only similar provision being for their resignation.

In the discussion of the bill the fact was mentioned that the salary of the late Justice Oliver Wendell Holmes, after his resignation, was for a time reduced by one-half; although it later was restored. Had the proposed change in the law been effected, five of the Justices would be eligible to retire at this time if they severally should have so chosen. One other Justice could have retired after one year. The other three would not have been eligible for seven years or more. All the Justices now serving were placed on the Court, under their present commissions, within a period of approximately twenty-one years, January 3, 1911, to March 14, 1932. Only three of the Justices have reached or will reach the age seventy years before having served ten years. The youngest member of the Court is just under 60 years of age; and the oldest member is slightly over 78 years. Seven of the present Justices were less than 60 years old when they took office and another was over 60 by only about 6 months.

Present economic conditions of the country were urged as one reason for defeating the bill. In its favor were presented the ideas of maintaining the independence of the judiciary and that it was not intended to be for the Justices individually but was for the benefit of the Court and of the people themselves.

It is of interest that the members of the House who spoke on this subject seemed to agree that, once a Justice had retired under the proposed enactment, his position would be beyond the power of Congress to change by future legislation. Why might it not under that situation be possible for Congress to repeal all laws or portions thereof which had created the status of a retired Justice, thus making it necessary for one in that situation either to resume his active duties on the bench, if able to do so, or to resign? It was suggested, in explanation of this amendment offered to the Judicial Code, that the Justices "come to the Supreme Court under a contract with the people for lifetime employment which Congress cannot take from them or reduce, which contract is imbedded in the Constitution." If that be the correct conception of a Supreme Court Justice's status, then, when he accepts a modification thereof under a statute, such change would seem to rest upon nothing stronger than a statutory contractual basis.

The vote on the question of passage of the bill was: Yeas, 144; Nays, 210; Not voting, 77.

President's Ship Subsidy Message

In his merchant marine message to Congress, the President recommended a policy of subsidizing American shipping for three reasons: First, in order that fair competition might be maintained against shipping combines and rebating methods which "may well be used to the detriment of American shippers" in time of peace by the shipping interests of other nations operating under subsidies; Second, because in event of a major war in which we were not involved this nation, in the absence of an adequate merchant marine, "might find itself seriously crippled because of its inability to secure bottoms for neutral peaceful foreign trade"; and Third, in a war of our own we should need naval auxiliaries and also merchant ships to maintain our necessary commercial intercourse with other nations.

The message explained that the recent "disguised subsidies to American shipping" had been unsatisfactory in that the "lending of money [at low rates of interest] for shipbuilding has in practice been a failure. Few ships have been built and many difficulties have arisen over the repayment of the loans." It was indicated also that "similar difficulties have attended the granting of ocean-mail contracts. The Government today is paying annually about $30,000,000 for the carrying of mails which would cost, under normal ocean rates, only $3,000,000. The difference, $27,000,000, is a subsidy, and nothing but a subsidy."

It was stated that the subsidy "should cover first the difference in the cost of building ships; second the difference in the cost of operating ships; and finally it should take into consideration the liberal subsidies that many foreign governments provide for their shipping." The President said further that "Congress should provide for the termination of existing ocean mail contracts as rapidly as possible." This calls to mind the fact that ocean mail contracts—or any other contract entered into by the United States prior to June 16, 1933, "for the transportation of persons and/or things"—"could be modified or canceled by the President prior to April 30, 1935, but only upon giving sixty days' notice and opportunity for public hearing to the parties to such contract." Independent Offices Appropriation Act, 1934, Section 5, Public No. 78, Seventy-third Congress, H. R. 5389, Approved June 16, 1933.

In urging his merchant marine policy, the President also said that Congress "should terminate the practice of lending Government money for shipbuilding. It should provide annual appropriations for subsidies sufficiently large to cover the differentials that I have described."

In partial explanation of the method of its application, it was said that the merchant marine legislation "should include not only adequate appropriation for such purposes and appropriate safeguards for its expenditure, but a reorganization of the machinery for its administration. The quasi-judicial and quasi-legislative duties of the present Shipping Board Bureau of the Department of Commerce should be transferred for the present to the Interstate Commerce Commission."

Judicial Executives and an Executive Judiciary

Executives are to perform judicial or quasi-judicial functions, and, in a different field of operation, a court is to

perform executive functions if certain bills now before the Senate should be enacted.

One of the bills referred to, S. 1958, among other things would create a National Labor Relations Board of three members. It provides that this Board, "an independent agency in the executive branch of the Government," may issue complaints, conduct hearings and proceedings (wherein, however, "the rules of evidence prevailing in courts of law or equity shall not be controlling"), summon witnesses by compulsory process, administer oaths, examine witnesses, receive evidence, have testimony taken before it or its designated agency filed with itself, make findings of fact, issue orders and awards, and that it may file its transcripts, orders, and awards, with the Federal courts, for the purpose of having the courts enforce such orders or enter judgments in accordance with the awards. The Board would be authorized to issue regulations and to make investigations. It would have jurisdiction over such matters as the type of union to be used by employees for collective bargaining purposes, prevention of unfair labor practices, and, upon agreement of the parties, to act as arbitrator in labor disputes or appoint arbitrators for that purpose. In this process the courts will have set before them what might be called predigested cases.

A branch of the judiciary would be assigned to the executive function of negotiating settlements of claims against the United States if there should be created an Indian Claims Court as proposed in the Senate by S. 1465. This court would be composed of five judges of the United States District or Circuit Courts "designated from time to time by the Chief Justice of the United States." It would "be the duty of the court to enter into negotiations for the immediate settlement of all claims of any Indian tribe or any band of Indians which have been heretofore or may hereafter be filed in the United States Court of Claims under Acts of Congress conferring special jurisdiction upon said Court of Claims."

When a settlement has been reached between the Indian Claims Court and the attorneys for the Indians (the Attorney General's approval not being required), "In addition to the full statement of the proposed settlement, there shall be submitted by the court a digest or summary of the proposed settlement in the simplest and plainest language possible." The settlement is then to be presented to the Indian tribe or band affected thereby and become binding if agreed to in writing by three-fourths of the men and women of the tribe of the age of twenty-one years or over. The Court of Claims is directed to enter the settlement in dollars as a judgment against the United States.

Cases wherein judgments by the Court of Claims are not more than twelve years old at the passage of this act may, within the discretion of the Indian Claims Court, be considered *de novo* where such "judgments were based upon technical grounds and were not based upon a full, fair, and complete adjudication, on the merits of the matters in controversy." In arriving at its settlements the court and the attorneys, the Attorney General representing the United Stats, "shall consider and present the entire matter unaffected by rules of evidence."

Public-Utility Holding Companies

The contest is progressing between the administration and the holding companies, especially those having to do with public utilities. In a recent message to Congress, the President deplored the "effort to stir up the country" against the proposed new legislation which would eliminate within 5 years those "utility holding companies which cannot justify themselves as necessary for the functioning of the operating utility companies." The bills introduced for this purpose are S. 1725 and H. R. 5423.

The President stated that the new law would "not destroy a penny of actual value of those operating properties which holding companies now control and which holding companies securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will, in fact, protect the investor."

One of the President's principles is that the holding company might serve a legitimate purpose if it "is equipped to offer a genuinely economic management service to the smaller operating utility companies," but that in such cases it should not own stock in the companies it manages and its fees should be reasonable. He indicated also that, in the interest of a proper diversification of investment, the stock of operating utility companies might be held by investment companies. But he recalled that "the holding company in the past has confused the function of control and management with that of investment and in consequence has more frequently than not failed in both functions." The difficulty of Government regulation seems a strong element in the President's view of this situation. He said that "regulation has small chance of ultimate success against the kind of concentrated wealth and economic power which holding companies have shown the ability to acquire in the utility field. No Government effort can be expected to carry out effective, continuous, and intricate regulation of the kind of private empires within the Nation which the holding company device has proved capable of creating."

The Presidents' decided feeling on the impropriety of permitting utility-holding companies to exist with their present powers is indicated where he states that this devise "dates definitely from the same unfortunate period which marked the beginning of a host of other laxities in our corporate law which have brought us to our present disgraceful condition of competitive charter mongering between our States."

The position which the President considers it is proper for holding companies to occupy in the utility field was indicated where he said "except where it is absolutely necessary to the continued functioning of a geographically integrated operating utility system, the utility holding company with its present powers must go." The reason for this latter expression is indicated where he said that "it is a corporate invention which can give a few corporate insiders unwarranted and intolerable powers over other people's money. In its destruction of local control and its substitution of absentee management it has built up in the public-utility field what has justly been called a system of private socialism which is inimical to the welfare of a free people."

Opponents of the proposed legislation regulating public-utility holding companies urge against its adoption: First, that it is unconstitutional in most of the situations where it would be put into effect since the Federal Government may control the operations of any company only when they constitute interstate commerce. They point out that the business of producing and dispensing electrical energy which would be classed as interstate commerce involves only 12 per cent of all electrical energy used in the country.

Second, that the President's attitude toward public-utility holding companies indicates that he probably holds similar views in respect to all holding companies. Substantiation for this conclusion is seen in the fact that he has indicated the regulation of utility holding companies would be accomplished by the Securities and Exchange Commission, rather than by the Federal Power Commission.

Third, that it might be difficult or impossible to divest holding companies of their management powers merely by making them over into investment companies holding the stock of the operating companies, since it is the ownership of stock which controls companies

through the power of electric directors; and,

Fourth, that State legislatures have ample power to control holding companies and that, if the commissions which they have set up for this purpose have been ineffective, the remedy is to correct the specific difficulties by State law and perhaps to have a Federal law which would regulate operating companies which are engaged in interstate commerce.

The N. I. R. A. and Antitrust Cases

A well known provision of the National Industrial Recovery Act is that while it is in effect, and for sixty days thereafter, "any code, agreement, or license approved, prescribed or issued and in effect" thereunder "and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States." U. S. C. A. Title 15, Section 705 (June 16, 1933, c. 90, Title I, Section 5, 48 Stat. 198).

In view of the above-provided remission of the antitrust laws under certain circumstances, it is interesting to observe that one day in February of this year when a count was made in the Department of Justice it was found that the United States had pending 27 antitrust cases.

New Deal Cases in Court

There were pending in the Federal courts early this month the following numbers of cases under the several acts mentioned: National Industrial Recovery Act, 332; Agricultural Adjustment Act, 46; Kerr-Smith Tobacco Act and Tennessee Valley Authority Act, 3 each; Bankhead Cotton Control Act, 2; and Emergency Railroad Transportation Act of 1933, Railroad Retirement Act, and Silver Purchase Act, 1 each.

Legislation Proposed

Relative to Members of Congress acting as attorneys in matters where the United States has an interest. S. 574, to Committee on the Judiciary. Also, to amend section 113 of the Criminal Code of March 4, 1909 (35 Stat. 1109; U. S. C. title 18, section 203). S. 213, to Committee on the Judiciary.

To provide for the investigation and trial of officers of vessels in case of disaster, and to increase efficiency in the administration of certain laws relating to the inspection of vessels. S. 2007, to Committee on Commerce. See also S. 2011—Fixing the liability of owners of vessels, to Committee on Commerce.

To prohibit employers from influencing the vote of their employees in national elections. S. 2134, to Committee on Judiciary.

To regulate and maintain an open market for the sale of goods in interstate commerce, to supplement existing laws against combinations in restraint of trade and discrimination in prices. S. 2211, to Committee on Judiciary. To the same effect is H. R. 6618, to Committee on Interstate and Foreign Commerce.

To provide for appeals from orders of Federal courts prohibiting compliance with Federal laws. H. R. 6624, to Committee on Judiciary.

To establish a bar library in the Supreme Court Building, to be known as the "Oliver Wendell Holmes Memorial Foundation." H. R. 6627, to Committee on Judiciary.

To make it unlawful for jurors who have served in criminal trials to move or travel in interstate or foreign commerce to give a public performance for profit involving the giving of information as to what transpired at such trial. S. 2224, to Committee on Judiciary.

To apply the quota system to immigration from the Republic of Mexico and the Philippine Islands. H. R. 6649, to Committee on Immigration and Naturalization.

To restore the 2-cent rate of postage on first-class mail matter. H. R. 6725, to Committee on Ways and Means.

To amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of State administrative boards. H. R. 6739, to Committee on Judiciary.

To abolish payment of salaries to resigned or retired judges of courts of the United States. H. R. 5616, to Committee on the Judiciary.

March 20, 1934.

Letter

"Brain Trusters" Needed for Bench and Bar

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

Let me say a word of appreciation for the A. B. A. JOURNAL. It tends to broaden the lawyer's legal horizon. The articles, while they do not lack local interest, are national or wider in scope. Many legal periodicals are primarily state publications and while in some articles they are of national interest, still many of them are provincial in character.

I took great pleasure in reading the article by Professor Edwin M. Borchard in the December number upon government liability for tort. The collegians are coming into their own in the matter of politics and economics and such men as Professor Borchard are doing similar work in the law. There is plenty of room for it.

The Roosevelt administration is to be commended for the introduction of the brain truster into politics and economics. It takes just such a force to drive politics and economics and government out of the morass they have led themselves into.

Lawyers and even judges get into a rut about as easily as any other class. They are prone to follow precedent blindly even though it may lead far from the straight and narrow path. When we consider that the courts of review of pioneer days, when many of these precedents were being set, were often hovering about the level of the proverbial Justice of the Peace Court, the necessity of a re-examination of these law (and especially constitutional) precedents is obvious.

My experience with the law of torts as applied to government units is about that of the usual general practitioner but it has been extensive enough for me to realize with Professor Borchard that the law as it exists today is illogical, confusing and at times startling. It becomes more obsolete with the abandonment of the laissez faire doctrine of economics.

The research and other work Professor Borchard has done in this connection and others, is of great service to the country at large and especially to the bench and bar. It will be a great influence in increasing the velocity of the movement in the direction of progress and enlightenment.

Lawyers and judges are notoriously ultra-conservative and any assistance that the brain trust can give in making them progressive is welcome. The bench and bar need brain trusters. Such men as Professor Borchard, John H. Wigmore, Dean Pound and others are earning our gratitude. In this connection let me say that I have been greatly edified by the articles and speeches of our progressive Attorney General Homer S. Cummings, given publicity in the JOURNAL, exhorting lawyers to be progressive.

A continuation of the great work along this line and an enlightened and sympathetic reception of it by our profession will bring about a condition of affairs when there will not be an overwhelming demand upon any real or fancied revolution or great reform movement to "first kill all the lawyers" so as to remove them from the path of progress.

FRANK J. BURNS

Kankakee, Ill., Dec. 22, 1934.

LAWYERS vs. CRIME

The following table showing legislative consideration of The American Bar Association's Criminal Law Recommendations and Uniform State Laws dealing with crime has been prepared to indicate the activity up to this time in the forty-four state legislatures meeting in 1935. The information given is based on reports of bar association committees, press notices and replies from state officials and is not complete:

States Whose Legislatures Meet in 1935	Provisions of American Law Institute Code Recommended Specifically				Advance Notice of Alibi and Insanity Defense	Comment on Failure of Defendant to Testify	Other Criminal Law Recommendations of the American Law Institute	Uniform Acts Introduced	State Department of Justice
	A	B	C	D					
Alabama			*	*			*	2, 3	
Arizona							*	1**, 4	
Arkansas	*		**	*			*	1, 3**, 4**, 5**	*
California						*		4	*
Colorado								1, 3, 4, 5	
Connecticut						*		3, 6	
Delaware									
Florida†									
Georgia	*		*		*		*	3	
Idaho								1, 2, 3	
Illinois									
Indiana		*			*	*	*	1, 2, 3**, 4**, 5**, 6	
Iowa	*	*		*	*		*	2, 5	
Kansas					*		*		
Maine								1	
Maryland		*						1, 4, 5	
Massachusetts									*
Michigan						*	*		
Minnesota	*		*		*	*	*	1, 5	
Missouri					*	*	*		
Montana									
Nebraska	*				*	*		1, 4	*
Nevada									
New Hampshire					*				
New Jersey									
New Mexico	*	*							
New York	*		*	*	*	*	*	4	*
North Carolina									
North Dakota		*					*	1	
Ohio								1	*
Oklahoma					*				
Oregon	*	*	*		*	*	*	1, 2, 3, 4, 5	
Pennsylvania	*	*				*	*		
Rhode Island									
South Carolina									
South Dakota					*			1, 2**	*
Tennessee									
Texas				*		*	*	1, 2, 3, 4, 5	*
Utah	*			*	*	*	*		
Vermont		**			**	**		2	
Washington								1, 2	
West Virginia								1, 2, 3, 4, 5	
Wisconsin						*		1, 2	
Wyoming								1, 4**, 5**	
Totals: Considered	10	8	6	6	14	14	17	63 (Acts)	8

Explanation:
*—introduced, **passed, †Florida Legislature convenes April 1, 1935.
A—Waiver of Jury Trial.
B—Use of Alternate Jurors.
C—Use of Information as Well as Indictment.
D—Less Than Unanimous Verdict.

1—Uniform Narcotic Act.
2—Uniform Firearms Act.
3—Uniform Machine Gun Act.
4—Uniform Criminal Extradition Act.
5—Uniform Act to Secure Witnesses from Without the State in Criminal Cases.
6—Uniform Act for Extradition of Persons of Unsound Mind.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Missouri

Mr. James E. King, Chairman of Special Committee on Coordination of Missouri Bar Association, Tells of Progress under Supreme Court Rules

The lawyers of Missouri were just beginning to achieve a workable form of federation when the Supreme Court of that state adopted its new rules which will assist in attaining that end, according to an article by James E. King, Chairman of the Special Committee of the Missouri Bar Association on coordination of local, state and national bar associations, which appears in a recent issue of the Missouri Bar Journal.

The Missouri Bar Association, according to Mr. King, continued along the even tenor of its ways for about fifty years, up to 1931. It was a voluntary association. Its membership consisted entirely of individual lawyers, and its work was carried on through voluntary committees, the activities of which were necessarily curtailed through lack of funds and the limited interest caused by the small representation of the lawyers of the state. In that year the membership was 1,622.

A federated bar plan was then adopted, to become effective when approved by local bar associations in the state representing counties having more than fifty per cent of the population of the state. The plan became effective at the end of the year. It provided that local associations should become affiliated members, and that the regular members should consist of the members of these affiliated associations, paying $3.00 per member per year to the state association. Individual members, not members of such affiliated associations, were required to pay $5.00 per year. As of the first of this year, 45 of the 114 counties in the state were represented by affiliated associations, as was the City of St. Louis. The total enrollment had increased to 2,151 members.

This movement has been continually gathering momentum. On November 1, 1934, the rules adopted by the Supreme Court provided for the payment of an annual license fee of $3.00 by all lawyers of the state. These rules also established in each of the thirty-eight judicial circuits a bar committee composed of four lawyers appointed by the Supreme Court to handle disciplinary matters and unauthorized practice. Following this, an amended constitution for the state association has been proposed calling for the creation of circuit bar organizations in each judicial circuit in the state. It contemplates a return to the voluntary form of organization insofar as dues and membership in the state bar association are concerned by eliminating the different classes of membership and providing that "every member of the Bar of Missouri qualified to practice law *under the rules of the Supreme Court of Missouri is eligible to membership in the Association*," and fixing uniform per capita annual dues of $3 per member payable direct to the Treasurer of the State Bar Association.

Mr. King concludes the article in the following words:

"We are in a transition stage and it is the opinion of those who have given the matter serious study that, with the proper functioning of the organization created by the Supreme Court Rules in conjunction with the co-operation of the individual lawyer and the aid of the State Bar Association, an ideal working arrangement for the uplift and advancement of the bar in the State of Missouri will be accomplished.

"The success of the Missouri plan of co-ordinating the activities of the Supreme Court Bar Committees and the agencies of the bar associations of the state will result in the establishment of an efficient organization with power and influence sufficient to attract and hold a really representative membership. When the American Bar Association adopts a plan of constitutional organization similar to the structure of the American Medical Association (which appears to be the most workable plan of organization so far evolved by a profession), Missouri will have a well organized group ready to become a component part, from which official delegates may be elected to the national organization with power to speak with authority in behalf of the lawyers of this state and for the benefit of the lawyers of the nation in solving the problems of the legal profession."

New Jersey

New Jersey Bar Association Starts Year with More Determined Effort to Join in General Movement for Improvement of Criminal Procedure — Special Committee on Unlawful Practice Appointed —Other News of Mid-Winter Meeting

A very interesting special mid-winter meeting of the New Jersey State Bar Association was held at the Robert Treat Hotel in Newark, N. J., on Saturday, February 2nd, 1935. Mr. Josiah Stryker of Newark, the President, presided. Reports of the work done by various committees since the annual meeting in the previous June were read and most of the reports were likewise discussed by the membership in general. During the year particular emphasis has been laid on an effort to co-ordinate the work of the New Jersey State Bar Association with that of the American Bar Association in the few instances where this has not previously been true.

Some time prior to the meeting there had been a conference of the Trustees, Legislative Committee, and such other committes as had to do with legislation in which the Bar is interested. This conference developed a program on which most of the effort will be concentrated this year, consisting of Jury Reform, Judicial Reform, Revision of Statutes, Unauthorized Practice of the Law, the payment of expenses of a Chancery investigation that had been made partly at the instance of the Bar, and the repealing of a law giving physicians a lien in accident cases. This suggested program does not, however, supplant the usual activities of the Association.

General Council Formed in State Bar

In accordance with the action of the Association taken at last June's meeting, the General Council which is of an advisory nature has been formed in the State Bar. This is composed of representatives of every county and has already proved a valuable part of the Association. A special committee has been formed from the Council to plan for Legislative activity and the Council is to become particularly active in that field. The members of this special committee are Messrs. William J. Connor of Trenton, Edmund S. Johnson of Jersey City, and Jay B. Tomlinson of Bordentown, with William W. Evans, Chairman of the standing Committee on Legislation, as an ex-officio member.

In addition to this committee a special committee to take up the matter of Unauthorized Practice of the Law has been appointed from the Association. This committee is composed of Messrs. Charles L. Carrick of Jersey City, Orlando H. Dey of Rahway, Harold A. Price of Morristown, Charles DeF. Besore of Trenton, George Gold of Paterson, and John M. Emery of Newark. This Committee has made an ex-

tensive survey and study of the problem of Unauthorized Practice of the Law in New Jersey and its report to the Association at this meeting together with the bill appended to the report, was one of the most widely discussed topics at the meeting. The Committee's bill has been introduced at this session of the Legislature. It has been found that two other bills on this topic have also been introduced and a strenuous effort will be made by the Bar to have legislation passed at this session which will give protection to the Bar and to the public in this line. Efforts have been made before this time but there has never been as much interest in this particular topic as at present. There is now an agreement between banks, fiduciaries, etc., and the Bar but this does not eliminate many of the evils arising from situations other than those controlled by the agreement.

Judicial Appointments Considered

Another matter to receive considerable interested attention was the question of Judicial Appointments. This Committee composed of Messrs. J. Henry Harrison of Newark, Robert H. McCarter of Newark, Albert C. Wall of Jersey City, William D. Lippincott of Camden, and William T. Boyle of Camden, has the assurance of the new Governor of New Jersey, Hon. Harold G. Hoffman, that he will consult with the Bar from time to time about proposed Judicial Appointments. It is not proposed that the endorsement of the Bar be given for any particular individual, but rather that the qualifications of those mentioned for appointment be passed upon by the proper committees of the Bar. It is not likely that this will result in political difficulties because the precedents for appointment have been established in the State and also because all of the committees act without regard to political party.

This year has started a more determined effort on the part of the Bar to join with the general movement in connection with Criminal Procedure, etc. A special committee composed of Messrs. William A. Wachenfeld of Newark, Thomas C. Haight of Jersey City, John E. Toolan of Perth Amboy, George B. Marshall of Woodbury, and Joshua R. Salmon of Morristown, was appointed. Its first report was made at the February meeting. It was encouraging to note that in this report it was found that many of the suggested methods of procedure have long since been adopted in New Jersey and that the Committee is making a close study of such items as have not yet become a part of our Law.

The Governor of New Jersey has called a special crime conference for March 1-2, 1935, the arrangements for which are being made with the able assistance of the President of the Bar, Mr. Josiah Stryker of Newark and many other officials, most of whom are members of the New Jersey State Bar Association.

Space does not permit a complete report on the more formal matters brought before the meeting.

Following the business meeting, luncheon was served to 400 members who were guests of the Association, the largest registration to date at any mid-winter meeting. Hon. William A. Schnader, former Attorney General of Pennsylvania was the speaker following the luncheon. His topic was "The New Contempt." His scholarly and carefully phrased address was very well received.

Particular appreciation was expressed to the members of the Program Committee composed of Messrs. Allen B. Endicott Jr. of Atlantic City, Walter Hanstein of Atlantic City, George R. Beach of Jersey City and Edward C. Waddington of Camden, for the excellent arrangements that had been made for this meeting.

EMMA E. DILLON, Secretary.

New York

Conspicuous Gathering of Local Bar Association Representatives in Syracuse—Methods of Stimulating Association Activity and Eliminating Unlawful Practice Considered

On March 9, 1935, there was held in Syracuse, New York, what was perhaps the most conspicuous gathering of representatives of local bar associations in upstate New York legal history. The presidents and delegates of upwards of thirty bar associations responded to the call of Lewis C. Ryan, president of the Onondaga County Bar Association.

The sessions lasted throughout the day; in the evening the delegates were guests of the Onondaga County Bar Association at its annual banquet. The object of the gathering was two-fold, (a) to devise means of strengthening local bar associations by increasing their activity in respect of matters of practical benefit to their members, and (b) to take definite steps to eliminate the unlawful practice of the law by laymen and corporations, to the end that the public and the profession will cease to suffer from "quacks."

Among the methods advocated for galvanizing local bar associations into greater activity was the publication of annual year books containing the list of members in good standing, history of the previous year, by-laws, etc.; the distribution of circular letters of the type published tri-weekly by the Research Committee of the Onondaga County Bar Association, in which important court decisions are briefly digested prior to appearance in the advance sheets; the promulgation of detailed reports and recommendations as to local and State government; the holding of historical pageants of a legal nature; greater use of the newspaper in regard to bar association work; the holding of frequent meetings where experts discuss problems of professional interest; the insistence upon the payment of dues as a condition to participating in bar activities, etc.

Definite measures were also taken toward curbing trust companies, collection agencies, trade associations, and kindred organizations in their efforts to practice law. It was pointed out that the lawyers are most at fault for prevailing conditions, since corporations could scarcely function as they do without the aid of lawyers who flaunt the code of ethics. It was contended that a bank lawyer who draws wills and trust agreements in which his client bank is named executor or trustee is on a parity with any ambulance chaser; that advertisements for fiduciary business are often comparable to literature advocating the purchase of patent medicines; that trade associations and collection agencies frequently indulge in vicious measures in insolvency and bankruptcy courts to the great detriment of the public; that notaries public commonly draw wills for individuals, especially in rural areas; that undertakers advise with respect to proceedings in probate courts; etc.

The meetings were addressed by George W. Wanamaker, secretary of the Erie County Bar Association; H. Douglass Van Deuser, president of the Rochester Bar Association; Senator Irving J. Joseph, chairman of the legislative committee of the New York County Lawyers' Association; Edwin N. Otterbourg, chairman of the committee on unlawful practice of the same association; Carl D. Isaacs, president of the Richmond County Bar Association; Henry Ward Beer, president of the Federal Bar Association; Assemblyman Horace M. Stone, former president of the Onondaga County Bar Association; Floyd E. Anderson, president of the Broome County Bar Association; Judge E. N. Scheiberling, president of the Albany County Bar Association; August G. Klages, first vice-president of the Queens County Bar Association; Sanford A. Davison, president of the Federation of Bar Associations of the Second Judicial District; and numerous others.

A resolution was passed empowering Lewis C. Ryan, president of the Onondaga County Bar Association, to appoint a committee of five selected at large from the State to confer with the president of the New York State Bar Association to the end that the legal profession may be represented at all times at the State capital during sessions of the Legislature, in order to keep local bar associations better informed as to pending bills so that the opinion of the bar may be focused and vocalized on matters of vital and far-reaching importance to the public and to the profession.

HENRY S. FRASER,
Chairman, Research Committee, Onondaga County Bar Association.

Wisconsin

Wisconsin Bar Association Holds Mid-Winter Meeting — Redrafted Integrated Bar Bill Approved with Certain Modificatons — Plan Proposed for Closer Connection with American Bar Association

The mid-year meeting of the State Bar Association was held at the Madison Club, Madison, on February 8. About 60 members were present, being officers, members of Board of Governors and of committees, and representatives of local bar associations throughout the state. President Doyle called the meeting to order. The sessions were devoted mainly to important committee reports.

The redrafted integrated bar bill was placed before the meeting by Lloyd K. Garrison, chairman of the drafting committee, and was discussed at length. The bill as redrawn would give the State Bar power to censure, suspend or expel its members, but leaves full power with the Supreme Court to review the decisions of its Board of Governors in disciplinary matters. The present disciplinary powers of the Board of Bar Commissioners were left undisturbed.

It was voted to eliminate from this bill any statement of minimum or maximum dues to be charged. The provision requiring the Board of Governors to select a president for the Association from its own members was also eliminated so as to leave the election of the president and other officers of the Association to the Association itself.

Recess was taken for luncheon, which was served in the glassed-in porch of the Madison Club, overlooking Lake Monona. There were present at this luncheon 82 members and guests, including Justices of the Supreme Court and local circuit, county and municipal judges, as well as several members of the legislature.

Work Done to "Sell" Integrated Bar to the Legislature

After luncheon Mr. Rix again took the chair and called upon E. A. Kletzien who, as chairman of the legislative steering committee, told of the work which had been done by that committee to acquaint members of the legislature with the bill for an integrated Bar, as well as its plans for future publicity. He said the prejudice and misconception that laymen are likely to have regarding a bill sponsored by lawyers must be overcome and the fact emphasized that in advocating this bill they are working in the interests of the general public.

President Doyle then requested Mr. Frank T. Boesel to preside at the discussion of this subject. Chairman Boesel stated that, as a member of the General Council of the American Bar Association, he was the only official bond or connection between that Association and the State Association; that that bond is not now very strong but an effort is being made to strengthen it. He read from the report of the committee of the American Bar Association on coordination of the bar which was presented at the Milwaukee meeting, and which told of the encouraging re-

sults obtained during the initial and trial year of the coordination plan.

Mr. Boesel then introduced Mr. Will Shafroth, director of the National Bar program. Mr. Shafroth spoke highly of the work of the Wisconsin Association, of the splendid manner in which it entertained the American Bar convention last summer, and particularly of the memoranda prepared by its committee on integration of the Bar, which has been circulated throughout the United States and constitutes the most comprehensive data that exist on that subject.

Progress of the National Bar Program

He then took up the National Bar program and pointed out several respects in which considerable progress has been made. As a result of questionnaires sent out and discussions promoted in the field of criminal law, for instance, several recommendations were adopted at the Milwaukee meeting, most of which were contained in the Model Criminal Code drafted by the American Law Institute and related to procedure. These resolutions were recommended by the Crime Conference called at Washington by the Attorney General and definite assurance has been received from eighteen different states that at least a part of these resolutions will be submitted to their legislatures. He concluded that if eighteen states can be persuaded to do something in this one field, it shows definitely that bar activity promoted by the National Bar Program is worth while.

He called attention to similar progress made in other fields, particularly judicial selection, which had resulted in California's adopting constitutional amendments by which judges will no longer be chosen by the accustomed method of popular nomination and election, but will be appointed and their appointments confirmed by four officials elected by popular vote; and after a trial period, the judge will be permitted to run against his record without opposition, the people voting merely whether he shall be retained in office.

While the reforms are important, he said, the American Bar Association is even more interested in getting, through this movement, a better organization of the Bar. The coordination committee has been seeking information as to the best form of organization, hoping to find something which will meet the approval of the substantial bar associations of the country. He told something of the organization of the American Bar Association and quoted from an article by John W. Davis in which he said that any claim of the American Bar Association to speak for the Bar as a whole is a usurpation. The only representatives the states now have in the government of the American Bar Association are the members of the General Council, who are chosen by caucuses held at the annual convention of the American Bar by lawyers who happen to be present at that convention, and who may or may not be members of the State Bar Associations. The chief function of the General Council is to nominate officers of the American Bar Association, the only other function being to consider matters of importance to the profession and make recommendations to the Executive Committee.

He expressed a desire to have the cooperation of the State Bar Associations in helping to bring about a better method of selecting representatives and delegates so that it may be said they speak for the Bar more generally.

Creation of Law Revision Commission Recommended

Mr. Alfred L. Gausewitz, chairman of the committee on Criminal Law, read a report which recommended the creation of a Law Revision Commission to study the laws relating to crimes, criminal procedure and the administration of criminal justice, including a consideration of a complete code of procedure such as the so-called Model Code of Procedure of the American Law Institute; also certain changes in the criminal law in line with approved conclusions in that field.

Mr. Edmund B. Shea, chairman of the committee on the unauthorized practice of the law, said the committee had gained considerable momentum in its work and was making perceptible progress, having been aided and stimulated by the leadership of the American Bar Association and its committee on unauthorized practice, which had done good work in causing to be collected the authorities on this subject and had pointed the way for state and local bar associations. He stated that the work of the committee is divided into three parts: First, investigation; second, promotion of discussion and dissemination of information; third, dealing with complaints.

He spoke particularly of the third division of this work, in which the office of the Attorney General had cooperated, stating that a number of quo warranto actions have been started by the Attorney General, and that other remedies, by injunction or otherwise, may be attempted. He said that the organization of an integrated Bar would materially help in this movement; that lawyers cannot give time to investigation and prosecution, but with an organized Bar it would be possible to have a staff attorney to carry on this work. The notaries public and others, he added, have not been asleep in this matter, as indicated by at least two bills that had been introduced in the legislature designed to make it possible for them to draw wills, deeds and other papers which they are now prohibited from drawing by the statutes.

At Mr. Shea's request, Assistant Attorney General Warren H. Resh outlined the work of his office in cooperation with the committee.

R. B. Graves, chairman of the committee on judicial selection, stated that a full report was made at the last annual convention, containing some important recommendations, and he asked members to read it; that at that time it was settled that the State Association was in favor of some change in the method of selecting judges and that question ought now to be beyond the controversial stage so far as lawyers are concerned. He said no definite plan can be adopted until we know what becomes of the plan for the integration of the Bar, and nothing remains to be done now except to begin to advise the public there is need for a change. He announced that a legal clinic was to be

held in Milwaukee on March 29, at which the subject of the selection of judges would be thoroughly discussed.

Bar Coordination Is Discussed

At this point the discussion of coordination was resumed and Chairman Boesel called upon Mr. Rix to open it. Mr. Rix stated that the Bar Association had displayed a great deal of energy which could be put to much better use if a satisfactory method of cooperation could be worked out. If there is any body of men that should have the equipment to enable it to speak with authority and assume leadership, it is the American Bar Association. Lawyers are individualists, he said, and are the hardest people in the world to get started, but when they get started they can go places; and there has never been a time when the country needed the leadership of the Bar as it does now.

It may be difficult to get physical coordination between the national and state associations, he continued, but progress has been made through the National Bar Program and it is now suggested that we can get coordination in a measure by having the members of the General Council named by the state associations. As has been stated, the members of that Council are nominated at a caucus held at the American Bar convention and that caucus can be made up of lawyers who are not members of the state associations. In many cases, members of the council elected in the past have been men who paid little or no attention to the work of the Bar Association in their states. The question is how shall this member of the Council be chosen? Personally, he favored the election method and that can be done at our annual meeting. He thought also that the Council should be given greater authority and more duties to perform rather than being a mere nominating committee as it is now.

Change in Method of Choosing Member of General Council Recommended

Mr. Shea moved that this group adopt a resolution embodying the recommendations expressed by Mr. Rix. The motion was seconded.

Mr. Shafroth stated that before nominations by state associations to the General Council would be binding, it would be necessary for the American Bar Association to make proper provision to that effect. However, he said, California's association adopted a resolution authorizing its executive committee to name its choice for the General Council, and an alternate, so that hereafter the executive committee of the Association will select the candidate for the General Council, and the caucus held at the annual conventions will naurally feel bound to follow the recommendations of this committee.

After some further discussion, the motion of Mr. Shea was unanimously carried.

Mr. Lucas moved that the American Bar Association be requested to amend its by-laws so that each state shall nominate its own representative on the General Council. Motion seconded and carried.

Immediately following the midwinter meeting the Board of Governors met and voted to hold the annual convention at Lawsonia June 27-29.

GILSON G. GLASIER,
Secretary and Treasurer.

The Movement for Bar Integration

The first president of the Washington State Bar, Hon. O. B. Thorgrimson, addressed the 1934 convention of his neighbor state, Idaho, where the State Bar was established in 1923. The address is reported in full in the proceedings of the tenth annual meeting. It is to be hoped that this address will be made available for circulation among all lawyers who seek information as to ways to invigorate their state associations. Washington was among the best of the states before the bar bill was enacted in 1933. The bar had pioneered in the federation of associations. It had at least gone through all the gestures of integration by virtue of large membership, which at one time included ninety-three per cent of the practitioners.

But it was not until adequate powers and revenue were assured by the bar act that the leaders and the bar generally took an inventory of their situation and came to realize how much effort was needed to combat old and growing evils. The reaction was swift. In one short years the bar was galvanized into action. Its latent talent and enthusiasm were given full scope. Discipline and education, theretofore managed by a state board, and with fairly good results, were taken up with an enlarged vision and full authority. With experience available in other states the bar governors knew precisely how to cope with these difficult matters. The bar was waterlogged with half educated members; there were no intimate local forces to clear practitioner's records or to impose appropriate penalties. There is not space here to mention one-tenth of the activities of the first year, all important, and all productive. This modest account of practical work is one of the most stimulating and informative that has yet been made.

There has been some speculation as to how the new judicial council created by the Missouri Supreme Court would be financed. It is very simple. The bar fund created by the payment of all practitioners of three dollars annually, will not only pay for disciplinary work, but will also meet judicial council expenditures. . . The Kansas City Law Review for February contains a very excellent account of developments in Missouri, written by Mr. Carl H. Langknecht, from the Richards case all through the evolution to and including the plans now pending for organizing the state bar, judicial council, administrative committees and judges. The nature of this original form of organization was briefly explained under the above heading in the January number of this JOURNAL. Missouri lawyers believe they have something not only original, but superior.

Oregon is the first state this year to adopt a bar act. But for the strategy of the proponents there might, perhaps, have been a second defeat. It would appear that the lawyers in the legislature favored the bill, for it was introduced simultaneously in senate and house by the judiciary committees, and speedily advanced to a vote in both houses at the same time. The result was that only nine opposing votes were recorded. The governor signed the bill on February 14. The commonest way for defeating a needed law is to allow it to receive a heavy majority in one chamber, and thus give undeserved confidence to its supporters. Action then is deferred until every trade and trick and deception can be worked to the limit, and the bill is killed in the second house, usually the senate. Finally it is hard even to know who did the dirty work. This time the tables were turned on the opponents.

The Oregon statute is an excellent draft in nearly all respects. It is good in providing three year terms for governors, and in alloting three to each congressional district. But it is not so good in limiting fees to three dollars. It subjects governors to recall, but this is not likely ever to be operative. A less desirable feature is that a majority

of members at any regular or special convention "may modify or rescind any action or decision of the board of governors and also may instruct the governors as to the future action, and the board of governors shall be bound by any such action or decision," and so forth. This provision contains the seed for serious schisms. Oregon is no pioneer state. Its bar has been competent, clean, trustworthy and conservative for sixty years. These qualities should render this ultra democratic procedure innocuous. But it will dampen discussions perhaps, on such vital matters as unlawful practice, in which able practitioners are sometimes involved as accessories.

The history of integrated bars shows clearly that free discussion of policies at conventions are exceedingly educative, but ultimate power is safe only in the board of elected representatives, who have the highest degree of responsibility and know far more than members concerning complex issues to be met. Such a division of powers goes far to undermine the responsibility of the governing board. Facing sharp issues it will appear, perhaps, far safer to defer action than to invite schisms.

Reports from the legislative shambles indicate the need for more spade work in Tennessee. An excellent bill is pending, but the state obviously has individualist lawyers who are grotesquely rugged, and probably proud of their abnormality. The states now campaigning for bar responsibility include a number which admittedly have desperate fights; and these usually call for several years of education. The Indiana bill is said to have been defeated. Hopes are at this time high in South Carolina and Arkansas. In Michigan there was much confidence until it appeared that the fellows once called "fiduciaries" were combining with all sorts of unlawful practitioners, who have been thoroughly scared of late, and also with the lawyer foes of professional responsibility. There appear to be two fights on for the Michigan State Bar Association at the same time. It is reported also that chances are not good in Kansas and Nebraska, but reasons are not assigned. Kansas has a fine bar, but afflicted with the ruggedness complex. In nearly every state, from this time, it must be assumed that a bar campaign will too much resemble Eliza crossing the Ohio on the ice cakes. (Let it be remembered that Eliza beat the bloodhounds, and we hope they drowned.)

President Caldwell of the Kentucky State Bar reports that the draft of organization rules invited by the Court of Appeal was the basis of discussion when the Bar committee conferred with the justices. Later the court promulgated its rule, pursuant to statutory authority, and it was virtually identical with the committee draft. Mr. Caldwell says that such a happy conclusion might not be reached in every state, but the chances are favorable at least. In the Kentucky plan fourteen commissioners are elected in seven appellate districts, and are divided equally in Eastern and Western divisions. Disciplinary cases will be determined finally in the district in which they arise, unless there be lack of unanimity of decision, when the entire commission must decide. This will much reduce the amount of time required for the hardest work the commission has to do, at least in the first few years. The entire commission will meet at the Capitol quarterly at fixed times, so members can arrange their work in advance. It is expected that the docket can be cleared at every two day quarterly session.

Section of International and Comparative Law Meets in Washington, D. C., on May 8

THE Section of International and Comparative Law of the American Bar Association will hold its second annual luncheon in the Mayflower Hotel in Washington, D. C. on May 8th in connection with the meeting of the American Law Institute. The program calls for a luncheon, for members of the Section and guests, to be held at 12:30, followed by an open meeting and discussion beginning at 1:45 P. M.

One topic in Comparative Law and one in International Law will constitute the program. The Comparative Law program under the supervision of Mr. Edward Schuster of New York, Vice-Chairman of Comparative Law, will be a discussion of "Government Controlled Corporations in America and Europe." Mr. Stanley Reed, General Counsel for the Reconstruction Finance Corporation, will open the discussion, followed by Mr. Thomas W. Palmer, Associate General Counsel of the Standard Oil of New Jersey and Vice-Chairman for the Committee on Foreign Law of the Association of the Bar of the City of New York, and Mr. Louis B. Wehle of New York, former General Counsel of the War Finance Corporation. Thereafter the meeting will be open to discussion from the floor.

The program on International Law under the direction of James Oliver Murdock of Washington, Vice-Chairman of International Law, assisted by Mr. Phanor J. Eder of New York, will involve a discussion of "Methods of Protecting American Holders of Foreign Bonds." Mr. William S. Culbertson will lead the discussion. Members of the following organizations are cordially invited to attend and take part in it: The American Society of International Law, American Law Institute, American Branch of the International Law Association, and American-Foreign Law Association.

(From the New York Times)

In the Senate of the United States it is conceded that no member is more high-minded than Carter Glass of Virginia. Also, on occasion, no member is more testy. Last week the Senator had an outburst of testiness which resulted in the deletion of all "and/ors" from a Roosevelt measure. The incident was petty in itself, but it turned out to be an omen. Mr. Glass ushered in a week of troubles for the administration.

The phrase "and/or" occurred repeatedly in the $4,880,000,000 work relief bill as that measure was sent to the Senate by the House. Said Senator Glass:

"A man who doesn't know whether he means 'and' or 'or' is unfit to write a statute."

In support of his position he quoted John W. Davis: "It is a bastard sired by Indolence (or Ignorance) out of Dubiety. Against such let all honest men protest."

The ruling of the Senate Appropriations Committee, before which Senator Glass took his stand, was: Out with the phrase.